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Supreme Court, U.S.
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In The

Supreme Court of the United States

HERSCHELL GLENN,

Petitioner,

v.

ROGER E. WALKER, JR., DIRECTOR,
ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The Illinois Court Of Appeals
For The Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth and the Due Process Clause of the Fourteenth Amendments to the United States Constitution mandate that all facts required for a court to impose an extended-term sentence be established by the standard of proof beyond a reasonable doubt.

Whether the rule that the prosecution must establish all facts required for a court to impose an extended-term sentence by proof beyond a reasonable doubt is retroactively applicable to cases brought on collateral review pursuant to *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) and *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988).

Whether this Petitioner's extended-term sentences in the companion cases arising from the same course of conduct violate the Sixth Amendment and the Due Process Clause to the Fourteenth Amendment to the United States Constitution because the facts used to impose the extended-term sentences were not subject to the standard of proof beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

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OPINIONS BELOW

The unpublished opinion of the Third District Illinois Appellate Court affirming the dismissals of the Petitioner's consolidated Petitions for Relief Pursuant to the Illinois *Habeas Corpus* Act in *Herschell Glenn v. Kenneth Briley*,[1] Will County Case Nos. 02 MR 430 & 430. Said opinion does not appear in a publication, but is included in the Appendix, at App. 1.

STATEMENT OF JURISDICTION

On December 3, 2007, the Illinois Court of Appeals for the Third Judicial Circuit issued its opinion affirming the dismissal of the Petitioner's companion Petitions for Relief Pursuant to the Illinois *Habeas Corpus* Act. On January 15, 2008, the Illinois Court of Appeals for the Third Judicial Circuit denied the Petitioner's timely filed Petition for Rehearing. On May 29, 2008, the Illinois Supreme Court denied the Petitioner's timely filed Petition for Leave to Appeal. Petitioner, Herschell Glenn, timely filed the instant Petition for Certiorari on or before August 26, 2008.

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[1] Kenneth Briley was the Director of the Illinois Department of Corrections on the date the Petitioner filed the consolidated *Habeas Corpus* Petitions at issue in the instant case. However, Roger E. Walker, Jr., is presently the Director of the Illinois Department of Corrections.

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State of wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ill.Rev.Stat., 1982, ch. 38, par. 9-1.

(b) **Aggravating Factors.** A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

* * *

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this section or any other law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as a result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

* * *

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong

probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child;

* * *

(g) **Procedure – Jury.** If at a separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

(h) **Procedure – No Jury.** In a proceeding before the court alone, if the court finds that none of the factors found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the Court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the Court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1).

Sentence of Imprisonment for Felony. (a) A sentence of imprisonment for a felony shall be a determinate sentence set by the Court under this Section, according to the following limitations.

(1) for murder, (a) a term shall be not less than 20 years and not more than 40 years, or (b) if the Court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the Court may sentence the defendant to a term of natural life imprisonment, or (c) if the defendant has previously been convicted of murder under any state or federal law or is found guilty of murdering more than one victim, the Court

shall sentence the defendant to a term of natural life imprisonment. . . .

730 ILCS 5/5-8-1(a)(1).

Sec. 5-8-1. Sentence of Imprisonment for Felony.

(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first degree murder,

(a) a term shall be not less than 20 years and not more than 60 years, or

(b) if a trier of fact finds beyond a reasonable doubt that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, except as set forth in subsection (a)(1)(c) of this Section, that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment, or

(c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if the defendant,

(i) has previously been convicted of first degree murder under any state or federal law, or

* * *

STATEMENT OF THE CASE

A. Statement of facts.

On or about May 8, 1982, the bodies of Lillian Final and James Wright were discovered in a forest preserve area. The body of Lillian Final was found just over the Cook County boundary, while the body of James Wright was discovered just over the Kane County boundary. The Petitioner, HERSCHELL GLENN, was taken into custody for the murders of both James Wright and Lillian Final, and has been in custody continuously since May 9, 1982. At the time of the Petitioner's arrest, the maximum (non-extended) sentence for murder was 40 years. [Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)]. Ultimately, the Petitioner was tried for the murder of James Wright in Kane County, and for the murder and rape of Lillian Final in Cook County.

The indictment in the Kane County Case did not allege any aggravating factors required to impose an extended-term sentence, and the Petitioner was never found death penalty eligible in either companion case. On May 11, 1983, a Kane County jury found the Petitioner guilty of the murder of James Wright, and the Petitioner was subsequently sentenced to an extended-term sentence of seventy (70) years. App. 54. The basis of the extended-term sentence was the trial judge's finding not subject to a standard of proof beyond a reasonable doubt that the Petitioner's

conduct constituted "exceptionally brutal behavior indicative of wanton cruelty." App. 52-54.

Similarly, the Cook County indictment did not allege facts sufficient to impose an extended-term sentence. On May 13, 1987, the jury in the Cook County Companion Case found the Petitioner guilty of murder and rape relating to Lillian Final. App. 26. Thereafter, the Cook County judge sentenced the Petitioner to an extended-term of natural life for murder, and a concurrent sentence of 30 years for rape. App. 36-38. The basis for the extended-term sentence was the Cook County trial judge's finding that in committing said murder, the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty, and that the Petitioner had been previously convicted of the murder of James Wright in the Kane County Companion Case. App. 36-38.

B. How the Question Was Presented.

The instant appeal is based on a singularly unique factual scenario, and arises from the dismissal without prejudice of the Petitioner's Consolidated Petitions for Relief pursuant to the Illinois *Habeas Corpus* Act (hereinafter referred to as the "*Habeas* Petitions"). App. 98-113. The *Habeas* Petitions at issue in the instant appeal allege that the Petitioner is entitled to immediate release from the Illinois Department of Corrections because his extended-term sentences for his companion murder convictions in

Kane and Cook Counties violate his right to due process concerning the burden of proof, his right to due process concerning notice, and his right to trial by jury pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. App. 98-113. In short, the instant *Habeas* Petitions allege that the Petitioner's seventy (70) year extended-term sentence for murder in the Kane County Companion Case is void because it was based solely on a judicial finding subject to only a preponderance of the evidence standard of proof that said murder was committed in an extremely brutal and heinous manner indicative of wanton cruelty. App. 99-100. The instant *Habeas* Petitions further allege that his extended-term sentence of life for murder in the Cook County Companion Case is void because it was based solely on a judicial finding made pursuant to a preponderance of the evidence standard of proof that said murder was committed in an extremely brutal and heinous manner indicative of wanton cruelty, and on the same finding that he had been previously convicted of murder in the Kane County Companion Case. App. 106-109.

On October 11, 2002, the Circuit Court dismissed the *Habeas* Petitions *without prejudice* because the Petitioner's request to voluntarily dismiss his appeal of the denial of a Post-Conviction Petition was still pending in the First District Appellate Court.[2] The

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[2] Prior to filing the *Habeas* Petitions at issue, the Petitioner had filed pursuant to the Illinois Post-Conviction Relief Act in

(Continued on following page)

Petitioner filed a timely Motion to Reconsider the dismissals entered on October 11, 2002, and on December 13, 2002, the Circuit Court granted the parties leave to file supplemental briefs addressing the evolving area of law arising from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). App. 16-17, 22-24, 91-95.

Thereafter, these cases were continued from time to time until on August 12, 2005, when the Court denied the Petitioner's Motion to Reconsider, without ever hearing argument on the pending 2-615 Motion to Dismiss, and without addressing the merits of the Motion to Reconsider. App. 19-21, 66-75. On September 9, 2005 and September 12, 2005, the Court denied the Petitioner's Motion to Clarify its orders of October 11, 2002, December 13, 2002, and August 12, 2005, and specifically held that its dismissal without prejudice resolved all issues of this case, and was a final and appealable order. App. 60-74. On September 12, 2005, the Petitioner timely filed his Notices of Appeal to the Third District Court of Appeals in these matters.

The Third District Court of Appeals chose to address the substantive issues raised in both the

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Kane County and Cook County, respectively. The post-conviction petitions were grounded in *Apprendi*. Both petitions had been dismissed, and Petitioner had filed appeals in both First (Cook) and Second (Kane) Appellate Courts. Prior to October 11, 2002, Petitioners Second District appeal was voluntarily dismissed. Subsequent to December 13, 2002, the First District appeal was voluntarily dismissed.

Habeas Petitions and the Petitioner's subsequent appeal of their dismissals. [App. 3-4 (stating "setting aside this case's procedural posture")]. Thereafter, on December 3, 2007, the Third District Court of Appeals entered an Appellate Court's opinion affirming the Circuit Court on the basis of this Court's holding that "[a]s long as Glenn's murder conviction for the death of Wright stands, regardless of the penalty imposed for it, Glenn's term of imprisonment for the murder of Final cannot be anything less than natural life without the possibility of parole. Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1[(a)](1)(b); *see* 730 ILCS 5/5-8-1(a)(1)(c)." App. 4. On December 21, 2007, the Petitioner timely filed his Petition for Rehearing. On January 15, 2008, the Third District Court of Appeals denied the Petition for Rehearing. App. 58. On May 29, 2008, the Illinois Supreme Court denied the Petitioner's timely filed Petition for Leave to Appeal. App. 59.

SUMMARY OF ARGUMENT

First, the Petitioner is entitled to immediate release because his extended-term sentences were imposed without the prosecution having to prove beyond a reasonable doubt that the Petitioner committed the elements required to impose said extended-term sentences. Here, this Court has held that each fact necessary to impose an extended-term sentence must be established beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 735 (2005); *Blakely v. Washington*, 542 U.S. 296,

124 S.Ct. 2531 (2004); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). Here, the Petitioner's extended-term sentence in the Kane County Companion Case was based on a judicial finding made by a preponderance of the evidence that in committing said murder, the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty. In the Cook County Companion Case, the Petitioner's extended-term sentence was based on the Cook County trial judge's finding that in committing said murder, the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty, and that the Petitioner had been previously convicted of the murder of James Wright in the Kane County Companion Case. The above findings made by the Cook County and Kane County judges were not subject to the standard of proof beyond a reasonable doubt.

Second, the above *Blakely/Booker/Winship* rule would require this Court to find that an extended-term sentence imposed without a finding beyond a reasonable doubt of all elements required for the extended-term sentences violates the Petitioner's ***substantive*** right to Due Process pursuant to the Fourteenth Amendment of the United States Constitution, and is subject to retroactive application in the instant *Habeas* Petition. *In re Winship*, 397 U.S. at 363-64, 90 S.Ct. at 1072-73; *see also Yates v. Aiken*, 484 U.S. 211, 214, 90 S.Ct. 534, 535, 538 (1988). *People v. DeLaPaz*, 204 Ill.2d 426, 791 N.E.2d 489 (2003) did not, and could not have overruled this bedrock rule of law. *Thurston Motor Lines, Inc. v.*

Jordan K. Rand, Ltd., 460 U.S. 533, 535, 103 S.Ct. 1343, 1344 (1983) (per curiam).

Third, the Illinois Supreme Court erred when it denied Petitioner Herschell Glenn's Petition for Leave to Appeal because the Illinois Court of Appeals incorrectly held that the Petitioner's murder conviction in the Kane County Companion Case qualifies as a "prior conviction" for murder which ***requires*** the Petitioner's sentence in the Cook County Companion Case to be nothing less than "natural life without the possibility of parole" pursuant to Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(b). The singularly unique factual scenario of the instant case results in the Petitioner's Kane County murder conviction not constituting a "prior conviction" for purposes of the above Illinois sentencing statute because it arose from facts related to the Cook County Companion Case. Furthermore, the fact of either the Petitioner's murder conviction in the Kane County Companion Case or whether the Petitioner killed two or more people in the same course of conduct was not subjected to the standard of proof beyond a reasonable doubt in the Cook County Companion Case. Consequently, the Appellate Court's reliance on the Petitioner's murder conviction in the Kane County Companion Case to affirm the dismissal of the Petitioner's *Habeas* Petition, because the issues of whether the Petitioner was "previously convicted of murder" or "murdered two or more individuals" violates the rule announced by this Court in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 735 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531

(2004); and *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

Next, the Appellate Court also erred in implying that *Lucien v. Briley*, 213 Ill.2d 340, 821 N.E.2d 1148 (2004) and *People v. DeLaPaz*, 204 Ill.2d 426, 791 N.E.2d 489 (2003) preclude the Petitioner from raising an *Apprendi* claim for the following reasons. First, the Petitioner's *Habeas* Petition is not based solely on *Apprendi*, but rather on *Booker (supra)*, *Blakely (supra)*, and *Winship (supra)* which address the applicability of the rule that each fact required to impose an enhanced sentence be subjected to the burden of proof beyond a reasonable doubt. As such, the Appellate Court's above implication would result in the Illinois Supreme Court's *Lucien* and *DeLaPaz* opinions overruling the United States Supreme Court's *Winship* and *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) which held that the Due Process right to the standard of proof beyond a reasonable doubt in criminal cases is retroactively applicable.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THAT THE PROSECUTION PROVE EACH FACT REQUIRED FOR A COURT TO IMPOSE AN EXTENDED-TERM SENTENCE BY PROOF BEYOND A REASONABLE DOUBT.

While the instant case provides a unique factual scenario, the opinion below also provides this Court with the opportunity to address the issue of whether the constitutional requirement that the prosecution must establish each fact by proof beyond a reasonable doubt extends to these facts required to impose an extended-term sentence. The Petitioner's unique factual scenario arises from the imposition of a life sentence based on a judge's finding subject only to a preponderance of the evidence subject to exceptionally brutal and heinous conduct indicative of wanton cruelty and that the Petitioner had previously been convicted of murder in a case whose facts related to the instant case but prosecuted in another county.

The Petitioner in the instant case is entitled to immediate release because his extended-term sentences were imposed without the prosecution having to prove beyond a reasonable doubt that the Petitioner committed the elements required to impose said extended-term sentences. In this regard, this Court has held that each fact required for a court to impose an extended-term sentence must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S.

358, 90 S.Ct. 1068 (1970); *see also as applied to the criminal burden of proof in extended-term sentences*, *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 735 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

In *Blakely v. Washington*, this Court held that due process requires that the prosecution satisfy its proof beyond a reasonable doubt burden for each element or fact required for a court to impose an extended-term sentence. *Blakely*, 542 U.S. at 296, 124 S.Ct. at 2531. When combined with the rule set forth in, *In re Winship (supra),* substantive due process requires that every defendant is entitled to proof "beyond a reasonable doubt" of every element of an offense required to impose an extended-term sentence. *Blakely*, 542 U.S. at 296, 124 S.Ct. at 2531; *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068; *see also Booker*, 543 U.S. at 220, 125 S.Ct. at 735. Consequently, the *Blakely/Winship/Booker* rule requires this Court to find that an extended-term sentence imposed without a finding beyond a reasonable doubt of all elements required for the extended-term sentences violates the Petitioner's *substantive* right to Due Process pursuant to the Fourteenth Amendment of the United States Constitution, and is *void*. *Blakely*, 542 U.S. at 301-02, 124 S.Ct. at 2536; *Winship*, 397 U.S. at 361-63, 90 S.Ct. 1071-72.

In the Seventh Circuit Court of Appeals' opinion in *Booker*,[3] the burden of proof was again specifically included as a separate, independent right that falls within the scope of *Apprendi*. Here, the Seventh Circuit stated as follows:

> As an original matter, then, we think that the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard, and thus the right of the defendant Booker to have a jury determine (using that standard) how much cocaine base he possessed and whether he obstructed justice, violate the Sixth Amendment as interpreted by *Blakely*.

Id. at 513. Ultimately, the Seventh Circuit was affirmed. *Booker*, 543 U.S. at 220, 125 S.Ct. at 735.

Next, in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856 (2007), this Court reaffirmed the above *Blakely/Booker/Winship* Rule. In *Cunningham (supra)*, this Court invalidated California's system of determinate sentencing for the crime of Continuous Sexual Abuse of a Child Under 14. Pursuant to the statutory sentencing scheme at issue, said offense was punishable by one of the three following precise

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[3] *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).

terms of imprisonment: a lower term sentence of 6 years; a middle term sentence of 12 years; or an upper term sentence of 16 years. The California statute at issue obliged the sentencing judge to impose the 12-year middle term unless the judge found one or more additional enumerated "circumstances in aggravation." If found to exist, the additional "circumstances in aggravation" would justify the imposition of the upper term sentence of 16 years. However, the provision of the California statute at issue did not provide for a right of trial by jury for the determination of the existence of the additional "circumstances in aggravation," and specifically provided that the "circumstances in aggravation" "must be established by a ***preponderance of the evidence***."

The majority opinion for *Cunningham (supra)*, specifically held that the California sentencing statute at issue violated the Sixth Amendment right to trial by jury and proof beyond a reasonable doubt standard as follows:

> [B]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, (citation omitted), the DSL [California statute at issue] violates, *Apprendi*'s bright-line rule: Except for a prior conviction, "any act that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, ***and proved beyond a***

> ***reasonable doubt***." [*citing to Apprendi*, 530 U.S. at 490].

Id., 127 S.Ct. at 868 (emphasis added). Thereafter, the *Cunningham* majority further pointed out the constitutional deficiency of the burden of proof required in the California statute at issue when it held that: "[F]actfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury ***employing a beyond a reasonable-doubt standard, not*** the bailiwick of a judge determining where the ***preponderance of the evidence*** lies." *Id.*, 127 S.Ct. at 870 (emphasis added).

Cunningham is the first in the *Apprendi* line of cases to not only address a sentencing scheme whereby the burden of proof for the aggravating factors qualifying a defendant for an extended-term sentence were specifically stated to be by a preponderance of the evidence, but also to specifically stress the burden of proof, along with the right to a trial by jury, as a separate right included in the *Apprendi* rule. Consequently, while not directly cited to as authority of the above, the *Winship* Rule[4] concerning the criminal standard of burden of proof is adopted as a separate right in the bright-line *Apprendi* rule. *Id.*, 127 S.Ct. at 868-70.

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[4] *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

The post-*Booker* case of *United States v. Pimental* supports the application of *Winship* Rule to defining the requirements of extended-term sentences. *United States v. Pimental*, 367 F.Supp.2d 143 (D.Mass. 2005). In *Pimental*, the court emphasized the importance of a higher burden of proof when imposing an enhanced or extended-term sentence, and states as follows:

> [c]ertain facts like the amount of loss continue to assume inordinate importance in the sentencing outcome. So long as they do, they should be tested by our highest standard of proof. * * * *. If the [Federal Sentencing] guidelines continue to be important, if facts the guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely proof beyond a reasonable doubt.

Id. at 153.

When read together, *Booker (supra)*, *Blakely (supra)*, and *Winship (supra)* create the ***substantive*** due process right that is a fundamental, bedrock principle of the American criminal justice system, that every defendant is entitled to proof beyond a reasonable doubt of every element of an offense required to impose an extended-term sentence.

II. THE RULE THAT THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THAT THE PROSECUTION PROVE EACH FACT REQUIRED FOR A COURT TO IMPOSE AN EXTENDED-TERM SENTENCE BY PROOF BEYOND A REASONABLE DOUBT IS RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW PURSUANT TO *IN RE WINSHIP*, 397 U.S. 358, 90 S.Ct. 1068 (1970) AND *YATES v. AIKEN*, 484 U.S. 211, 108 S.Ct. 534 (1988) BECAUSE THE UNITED STATES SUPREME COURT HAS NEVER REVERSED EITHER *WINSHIP (supra)* OR *YATES (supra)*.

The Due Process requirement that each fact necessary to impose an extended-term sentence be subjected to a standard of proof beyond a reasonable doubt is retroactively applicable to cases on collateral review because the above Due Process right is a fundamental, bedrock principle of the American criminal justice system,[5] and this Court has not reversed *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) which holds *Winship (supra)* retroactively applicable. In the instant case, the Illinois Appellate Court erred in implying that *Lucien v. Briley*, 213 Ill.2d 340, 821 N.E.2d 1148 (2004) and *People v. DeLaPaz*, 204 Ill.2d 426, 791 N.E.2d 489 (2003) preclude the Petitioner from raising an *Apprendi* claim in his

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[5] *Blakely*, 542 U.S. at 301-02, 124 S.Ct. at 2536; *Booker*, 543 U.S. at 220, 125 S.Ct. at 735; *Winship*, 397 U.S. at 361-63, 90 S.Ct. at 1071-72.

Habeas Petitions because the *Apprendi* Rule is not retroactively applicable. However, in the instant case, Petitioner's *Habeas* Petitions are not just based on *Apprendi*, but also on *Booker (supra), Blakely (supra),* and *Winship (supra)* which address the applicability of the rule that each fact required to impose an enhanced sentence be subjected to proof beyond a reasonable doubt standard of proof in addition to the *Apprendi* requirements relating to notice and right to trial by jury. As such, the Appellate Court's above implication would result in the Illinois Supreme Court's *Lucien* and *DeLaPaz* opinions overruling the United States Supreme Court's *Winship* and *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) which held that the right to the standard of proof beyond a reasonable doubt in criminal cases is retroactively applicable.

Here, the Petitioner argues not simply that the right to trial by jury and notice via indictment directly addressed by *Blakely* overrules *DeLaPaz*, but that *Blakely*, when read with *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), requires that the *Apprendi* Rule be applied retroactively to this case because the constitutional burden of proof required to impose the extended-term sentences was not applied to those factors used to impose the extended-term sentences in this case. Since *Winship* is retroactive,[6] the Petitioner's

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[6] *Yates v. Aiken*, 484 U.S. 211, 214, 216-17, 108 S.Ct. 534, 535, 538 (1988).

extended-term sentences in the instant case are void and subject to collateral attack at any time. *City of Chicago v. Roman*, 184 Ill.2d 504, 510, 705 N.E.2d 81 (1988).

While the due process guarantee regarding the criminal burden of proof is one of the foundations of *Apprendi*, the issue of *whether Apprendi's requirements regarding the criminal burden of proof for each element required for a court to impose an extended-term sentence is retroactively applicable to cases on collateral review has not been squarely addressed. Apprendi*, 530 U.S. at 476-77, 120 S.Ct. at 2355-56. Here, the *DeLaPaz* case did not address whether the portion of the *Apprendi* Rule based on the due process "beyond a reasonable doubt" standard is retroactively applicable. *DeLaPaz*, 204 Ill.2d at 434-39, 791 N.E.2d at 495-97 (analysis of retroactive application based on whether a violation of the Sixth Amendment right to a trial by jury is entitled to retroactive application).

Furthermore, *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004), is not applicable to the singularly unique facts in the instant case because it did not squarely address the application of *Winship* to *Apprendi* as argued by the Petitioner in the instant case. For that matter, this Court did not squarely address the application of *Apprendi* and *Blakely* to *Winship*'s bedrock constitutional principle of requiring the prosecution to establish proof beyond a reasonable doubt for each element required to convict an individual of a crime. *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546 (2006). Based on the above,

Schriro (supra), and *DeLaPaz (supra)* do not apply to the instant case because the Petitioner's claim is not based on either an *Apprendi* right to jury, or an *Apprendi* right to indictment claim, but instead based on the theory that *Apprendi* when read with *Blakely (supra)* and *Winship (supra)* establish that due process requires that the prosecution satisfy its ***proof beyond a reasonable doubt*** burden for each element required to impose an extended-term sentence.

In applying the *Apprendi* rule to the sentencing scheme at issue, the *Blakely* Court stated as follows:

> [T]his [Apprendi] rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), ***and that "an accusation which lacks any particular fact which the law makes essential to the punishment . . . no accusation within the requirement of the common law, and is no accusation in reason,"*** 1 J. Bishop, Criminal Procedure §87, p.55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; * * * * .

Blakely, 542 U.S. at 301-02, 124 S.Ct. at 2536 (emphasis added). Thereafter, the *Blakely* Court specifically found that the *Apprendi* rule was not procedural, and held the right to a jury trial "is ***no***

mere procedural formality, but a fundamental reservation of power in our constitutional structure" imposed to ensure the people's ultimate control in the judiciary just as the right to vote ensures the people's ultimate control in the legislative and executive branches of our government. *Id.* at 305-06, 124 S.Ct. at 2538-39 (emphasis added). In so holding, the *Blakely* majority stands for the proposition that implicit in the right to a jury to determine each fact necessary to impose an extended-term sentence is the substantive due process right that each such fact is subject to the "beyond a reasonable doubt" standard set forth in *In re Winship (supra). Id.*

The *Winship* Case addressed a New York statute relating to the burden of proof required in a delinquency proceeding in juvenile court that, if met, would expose a minor to a period of confinement. The New York statute at issue in *Winship* provided that the burden of proof in such a proceeding was "based on a preponderance of the evidence." *In re Winship*, 397 U.S. at 360, 90 S.Ct. at 1070. In holding that due process requires that the prosecution be held to a "beyond a reasonable doubt standard" for "***every fact necessary to constitute the crime with which he is charged***," the *Winship* Court stated as follows:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times,

(though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence, § 2497 (3d ed. 1940). * * * * .

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. [Citations in Opinion]. Mr. Justice Frankfurter stated that "[i]t the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion – basic in our law and rightly one of the boasts of a free society – is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" [Citation in Opinion]. In a similar vein, the Court said in *Brinegar v. United States, supra*, at 174, that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined that which long experience in the common-law tradition, to some extent embodied in the Constitution has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Davis v. United States, supra*, at 488, 16 S.Ct., at 358 stated that the requirement

> is implicit in "constitutions . . . [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty." In *Davis* a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: "On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing the crime. . . . No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is *sufficient to show beyond a reasonable doubt the existence of every fact necessary* to constitute the crime charged." [Citation in Opinion] (emphasis added).

Id. at 362-63, 90 S.Ct. at 1071-72.

In explaining the "vital role" the "reasonable-doubt standard" plays in the American scheme of criminal procedure the *Winship* Court noted that the standard "provides concrete substance for the presumption of innocence – ***that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'***" *Id.* at 363, 90 S.Ct. at 1072. (emphasis added). Not only did the *Winship* Court expressly hold that the reasonable doubt standard

was a "bedrock" principle whose "enforcement lies at the foundation"[7] of our criminal justice system,[8] it further expressly held that ***the "reasonable doubt standard" applies to "every fact necessary to constitute the crime with which he is charged."*** *Id.* at 364, 90 S.Ct. at 1073 (emphasis added). Here, the *Winship* Court held as follows:

> [L]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that *the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of* ***every fact*** *necessary to constitute the crime with which he is charged.*

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[7] *Teague v. Lane*, 489 U.S. 288 (1989); *adapted in Illinois by People v. Flowers*, 138 Ill.2d 218 (1990). In *Teague*, the United States Supreme Court held that a new rule of law will only be applied retroactively to cases on collateral review if it falls within one of two situations. *Teague*, 489 U.S. at 309-15. The first exception allows a new rule to be applied retroactively "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." The *Teague* court further held that the second exception should only apply to "watershed rules of criminal procedure" that "will probably alter our understanding of the bedrock procedural elements that must be found to vitiate that fairness of a particular conviction," and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* The Court made it clear that the second exception applied, not only to concerns regarding an accurate conviction, ***but also procedures that questioned the accuracy of a sentence***. *Id.* (emphasis added).

[8] *In re Winship*, 397 U.S. at 363, 90 S.Ct. at 1072.

Id. (emphasis added). In addition to the specific language set forth by the *Winship* Court *(supra)*, that the reasonable doubt standard is a bedrock principle of our criminal justice system, the *Winship* opinion was specifically held to be retroactively applicable in *Yates v. Aiken*, 484 U.S. 211, 214, 216-217, 108 S.Ct. 534, 535, 538 (1988). The requirement that the burden of proof requirement applies to each fact required to impose an extended-term sentence was recently reaffirmed in *Booker*, 543 U.S. at 220, 125 S.Ct. at 748.

An examination of the *Booker*[9] opinion demonstrates the significance of the absence of the retroactive application analysis of the *Booker/Blakely/Winship*, rule in *Schriro (supra)*, *DeLaPaz (supra)*, and *Lucien v. Briley*, 213 Ill.2d 340, 821 N.E.2d 1148 (2004). In this regard, the Petitioner notes that the *Booker* majority written by Justice Stevens begins its legal analysis by restating[10] the prosecution's burden

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[9] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 735 (2005).

[10] Specifically, Justice Stevens' opinion stated as follows:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511,

(Continued on following page)

of proof requirement as set forth in *Winship*, as "basic precept, firmly rooted in the common law." *Booker*, 125 S.Ct. at 748. Here, Justice Stevens made clear that the *Winship* rule is a rule independent of "the right to demand that a jury find him guilty of all the elements of the crime which he is charged." *Id.* This interpretation of Justice Steven's majority opinion in *Booker (supra)* is consistent with the Seventh Circuit's analysis in *Booker*, when the court of appeals specifically mentioned the due process burden of proof requirement separate from the right to a trial by jury. Specifically the Seventh Circuit stated as follows:

> [A]ll it [the sentencing commission] cannot do under *Blakely* is take away from the defendant the right to demand that the quantity [of drugs] be determined by the jury rather that by the judge, ***and on the basis of proof beyond a reasonable doubt***. * * * * But the issue in *Blakely* was not sentencing discretion – it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented ***and to do so on a basis of only the civil burden of proof***. The vices of the guidelines are thus that they *require* the

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115 S.Ct. 2310 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

Booker, 125 S.Ct. at 748.

> sentencing judge to make findings of fact ***(and to do so under the wrong standard of proof)***, * * * * .

Booker, 375 F.3d at 511 (emphasis added).

Furthermore, *Booker* demonstrates the correct analysis for determining whether a statute is void *ab initio*. Contrary to the approach taken in *Lucien (supra)*, wherein the Illinois Supreme Court went to great lengths to find any constitutional interpretation for the statute at issue to find that it was not void, the *Booker* Court held that the United States Sentencing Guidelines were void *ab initio* despite numerous obvious constitutional interpretations. *Booker*, 543 U.S. at 220, 125 S.Ct. at 256-57, 764-68. Specifically, the dissenting opinion authored by Justice Stevens sets forth numerous examples of how the USSG could have been applied in a manner consistent with *Apprendi*. *Booker*, 543 U.S. at 220, 125 S.Ct. at 772 -776. However, despite the numerous obvious examples of how the USSG could have been applied consistently with the requirements of *Apprendi (supra)*, the majority opinion authored by Justice Breyer held that the mandatory nature of the USSG rendered them "incompatible with today's holding." *Id.* at 220, 125 S.Ct. at 756-57, 764-768. Thereafter, the portions of the USSG that require mandatory application of the USSG were found to be void, and severed from the remaining portions of the USSG.

Thus, contrary to *Lucien (supra)*, *Booker* holds that any portion of a determinate sentencing scheme (such as the portion of the Illinois sentencing scheme at issue in the instant case) must be found to be void, and severed from the constitutionally valid portions of the sentencing scheme. *Booker*, 543 U.S. at 220, 125 S.Ct. at 756-57. *Booker* then overrules Illinois law[11] relied on by the Respondent to the extent that said cases hold that a constitutionally infirm portion of the Illinois sentencing scheme is not void *ab initio* unless they lack any possible valid application. *Cf.*, *Lucien*, 213 Ill.2d at 340, 821 N.E.2d at 1148.

Consequently, the *Blakely/Booker/Winship* rule would require this Court to find that an extended-term sentence imposed without a finding beyond a reasonable doubt of all elements required for the extended-term sentences violates the Petitioner's ***substantive*** right to Due Process pursuant to the Fourteenth Amendment of the United States Constitution, and is subject to retroactive application in the instant *Habeas* Petition. *In re Winship*, 397 U.S. at 363-64, 90 S.Ct. at 1072-73; *see also Yates*, 484 U.S. at 214, 216-217, 108 S.Ct. at 535, 538. *DeLaPaz (supra)* did not, and could not have overruled this bedrock rule of law. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344

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[11] *Lucien*, 213 Ill.2d at 340, 821 N.E.2d 1148 (2004); *DeLa-Paz*, 204 Ill.2d at 426, 791 N.E.2d at 489; *Davis*, 156 Ill.2d at 149, 619 N.E.2d at 750; *People v. Jackson*, 199 Ill.2d 286, 769 N.E.2d 21 (2002).

(1983) (per curiam) (holding that a lower court owes deference to those above it; ordinarily it has no authority to reject a doctrine developed by a higher court).

III. THE PETITIONER'S EXTENDED-TERM SENTENCES IN THE INSTANT CASE VIOLATES THE REQUIREMENT THAT EACH FACT NECESSARY FOR A COURT TO IMPOSE AN EXTENDED-TERM SENTENCE BE SUBJECT TO THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT BECAUSE THE FACT OF THE KANE COUNTY MURDER CONVICTION WAS NOT SUBJECT TO THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN THE COOK COUNTY MURDER CASE WHERE THE PETITIONER RECEIVED THE NATURAL LIFE SENTENCE.

Next, the court below's opinion incorrectly considered the Kane County Conviction involving the death of James Wright a "prior conviction" pursuant to Section 5-8-1(a)(1)(c) of the Code of Corrections because the murders for which the Petitioner was convicted in the companion cases occurred during the same course of events, and do not fit the definition of "having previously been convicted of murder" as required for the application of either 730 ILCS 5/5-8-1(a)(1)(c), or Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(b).

The mandatory provision of Section 5-8-1(a)(1)(c)[12] is not applicable to the instant case because the *singularly unique* factual scenario regarding the murder conviction in the Kane County Companion Case does not constitute a "prior conviction." As such, this Court should find that the Petitioner's extended-term life sentence in the Cook County Case violates the *Blakely/Booker/Winship* Rule because the Kane County conviction upon which it is based does not satisfy the definition of "having previously been convicted of murder." Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(c). In the instant case, the Petitioner was charged with two separate murders in two different cases in two different counties ***for related events*** that occurred in the early morning hours of May 8, 1982. App. 98-113. However, the Cook County jury returned a verdict of murder to ***only one victim***, Lillian Final. App. 26-27. Similarly the Kane County jury returned a verdict of murder to only one victim, James Wright. App. 53-54. Here, the prosecuting States Attorneys Offices decided to prosecute the Petitioner separately for each murder. Consequently, despite the fact that the Kane County Companion Case was concluded prior to the conclusion of the Cook County Companion Case, the Petitioner does not qualify as a recidivist offender because the facts underlying the companion cases arose from related events. Furthermore, neither of the Kane County nor the Cook County juries was

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[12] Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(c).

asked to and did not rule on both murder counts because the prosecution elected to prosecute cases separately in different counties. Consequently, the Kane County murder conviction does not satisfy the definition of "having previously been convicted of murder," was not stipulated to by the Petitioner as a prior conviction, and was not subjected to a burden of proof beyond a reasonable doubt. *Booker*, 543 U.S. at 220, 125 S.Ct. at 735; *Blakely*, 542 U.S. at 296, 124 S.Ct. at 2531; *In re Winship*, 397 U.S. at 358, 90 S.Ct. at 1068; *see also People v. Jones*, 322 Ill.App.3d 236, 749 N.E.2d 466 (3rd Dist. 2001) (regarding the definition of the "recidivist section" of the Illinois Sentencing Statute).[13]

In the instant case, the Illinois Appellate Court relied solely on the mandatory portion of section 1005-8-1(a)(1)(c) to affirm the dismissal of the instant *Habeas* Petitions based on the Petitioner's conviction for the murder of James Wright in the Kane County Companion Case. App. 4-5. This portion of the sentencing statute is commonly referred to as the recidivist exception to the *Apprendi* Rule. However, the recidivism portion of section 1005-8-1(a)(1)(c) does not apply to the ***unique*** scenario in the instant case

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[13] The *Jones* court adopted this requirement when it stated the following three factors to consider when analyzing the application of the recidivism exceptions: (1) prior conviction entered in proceeding when he received due process; (2) that defendant admitted the fact of the prior conviction; and (3) ***that the prior conviction did not relate to the instant offense***. *Jones*, 322 Ill.App.3d at 242-43 (emphasis added).

because the conviction for murder in the Kane County Companion Case arose from related events as those in the Cook County Companion Case, and did not constitute prior criminal activity as defined by *Jones*, 322 Ill.App.3d at 236, 749 N.E.2d at 466. In this regard, Black's Law Dictionary defines "recidivist" as "[A] habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime." [Black's Law Dictionary, at 1269 (6th ed. 1990).] In the instant *Habeas* Petition, the Petitioner specifically alleges that the "prior conviction" from Kane County Companion Case relied on by the sentencing judge to impose the extended-term sentence arose from "facts related to the instant offense." App. 107-109. The above-referenced allegations sufficiently allege that the "prior conviction" in the instant case does not constitute a "prior conviction," and does not satisfy the definition of "recidivism," or "having previously been convicted of murder." *Jones*, 322 Ill.App.3d at 236; *see also Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 (2005). Based on the above, the murder conviction in the Kane County Companion Case does not constitute a prior conviction within the meaning of "having been previously convicted of murder" as required by section 1005-8-1(a)(1)(c), and it cannot be used to trigger the mandatory natural life provision of the sentencing statute in the Cook County Case. *People v. Austin*, 267 Ill.App.3d 469, 475-76, 641 N.E.2d 970, 974 (1st Dist. 1994) (finding reversible error in basing an extended-term life sentence on an aggravating factor that was

not "within the meaning" of the statutory aggravating factor).

Alternatively, even if this Court finds that the unique fact scenario underlying the Petitioner's murder convictions constitutes "a prior conviction" consistent with the definition of recidivism, the Petitioner's extended-term sentence is still void because the Petitioner believes that the recidivist exception is no longer recognized by the majority of this Court as an exception to the *Apprendi* Rule. *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1262-63 (2005) (holding that proof of prior convictions are subject to the *Apprendi* rule if there remain facts in dispute as to whether the prior conviction in question qualifies as the type of prior conviction identified as an aggravating factor sufficient to enhance a defendant's sentence beyond the statutory non-extended term). In his concurring opinion, Justice Thomas provides the next logical step, and finds that the recidivism exception to the *Apprendi* Rule should no longer be considered controlling law because "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Id.* at 1264 (THOMAS, J., concurring) (*citing Almendarez-Torres v. United States*, 523 U.S. 224, 248-49 (1998) (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting), *Apprendi (supra)* at 520-21 (THOMAS, J., concurring)). Based on the above, the Petitioner argues that the recidivist exception to the *Apprendi* rule is no longer controlling, and proof of facts of prior convictions are subject to the

Apprendi rule. *Shepard,* 125 S.Ct. at 1264 (THOMAS, J., concurring).

In the Cook County Case, whether the murder of James Wright "did not relate to" the murder of Lillian Final was not stipulated to, and was not subject to the "proof beyond a reasonable doubt" standard. *Shepard*, 125 S.Ct. at 1262-63; *Jones,* 322 Ill.App.3d at 236. *Consequently*, the extended-term portion of the Petitioner's Cook County life sentence violates the *Apprendi* rule because the proof of prior conviction for murder used as the aggravating factor in the Cook County Case was neither charged, submitted to the jury, or subject to the "proof beyond a reasonable doubt" standard of proof, and a question of fact exists as to whether the conviction in the Kane County Companion Case constituted "having been previously convicted of murder" within the meaning of par. 1005-8-1. *Austin,* 267 Ill.App.3d at 475-76, 641 N.E.2d at 974. As such, the recidivist exception pursuant to *Almendarez-Torres (supra)* is not applicable to the instant case, and it was reversible error for the court to apply the recidivist exception to both the *Apprendi* Rule and the *Blakely/Booker/Winship* argument set forth by the Petitioner because a question of fact exists as to whether the murder conviction in the Kane County Companion Case constitutes a prior conviction within the meaning of the statute. *Shepard*, 125 S.Ct. at 1262-63; *Jones,* 322 Ill.App.3d at 236; *Austin,* 267 Ill.App.3d at 475-76, 641 N.E.2d at 974.

Next, the Petitioner argues that the Illinois Appellate Court erred in relying on 730 ILCS 5/5-8-1(a)(1)(c) because the mandatory natural life sentencing provision contained in § 5-8-1(a)(1)(c) did not exist in 1982, when the murders occurred. *See* Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(c). In this regard, the above statute provided that a life sentence imposed pursuant to either the "prior conviction" or "convicted of murdering more than one person" was discretionary. *Id.* In fact, a sentence of life imprisonment was not even mandatory if the sentencing judge found the existence of a mitigating factor sufficient to preclude the imposition of the death penalty after the individual had been determined to be eligible for the death penalty pursuant to § 9-1(g) & (h) of the Illinois Criminal Code[14] which provided that in situations where either the judge or jury found the existence of a mitigating factor precluding death, "the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections." Ill.Rev.Stat., 1982, ch. 38, par. 9-1(g), (h). Furthermore, not even the extended-term portion of the Unified Code of Corrections allowed for a life sentence for first degree murder even in a discretionary manner. Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-2. Specifically, the only sentencing statute that related to a mandatory life sentence was for "a person adjudged a habitual criminal under Article 33B of the Criminal Code of 1961, as amended." Ill.Rev.Stat., 1982, ch. 38, par.

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[14] Ill.Rev.Stat., 1982, ch.38, par. 91-1(g) & (h).

1005-8-1(a)(2). In the instant case, the Petitioner was neither qualified for nor adjudicated a habitual criminal pursuant to the relevant statute.

In light of the above state of the Illinois sentencing law in effect in 1982, and applicable to the instant case, the mandatory life sentencing provision of § 5-8-1(a)(1)(c)[15] did not exist, and there was no other provision of mandatory life sentence that applied to the instant case. Based on the above, it was error for the court below to apply said section as the basis for affirming the denial of the instant *Habeas* Petition because such action would violate the *ex post facto* clause of the United States and Illinois Constitutions. U.S. Const., art. I, §§ 9 (federal) and 10 (state); Ill. Const., art. I, § 16; *see also Lindsey v. Washington*, 300 U.S. 652, 57 S.Ct. 300 (1937); *People v. Craig*, 47 Ill.App.3d 242, 361 N.E.2d 736 (1st Dist. 1977); *People v. Sims*, 43 Ill.App.3d 910 (4th Dist. 1976).

Next, even if 730 ILCS 5/5-8-1(a)(1)(c) was in effect in 1982 in the same form as presently, the court below incorrectly applied the mandatory life sentence pursuant to the present version of Section 5-8-1(a)(1)(c), for the additional reason that the sentencing judge never ruled on a request by the prosecution to find the Petitioner eligible for the death penalty. In this regard, by expressly stating that for first degree murder "the court shall sentence the defendant to a term of natural life imprisonment ***when the death***

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[15] 730 ILCS 5/5-8-1(a)(1)(c).

penalty is not imposed if the defendant," the plain language of Section 5-8-1(a)(1)(c) requires that the court must have considered and rejected the death penalty in order for the mandatory natural life provision of the Unified Code of Corrections to apply. [730.ILCS 5/5-8-1(a)(1)(c)] (emphasis added).

The plain language of the above statute requires that a court consider, but not impose the death penalty as a requirement to the application of the mandatory natural life provision of the statute. *See People ex rel. Daley v. Strayhorn*, 119 Ill.2d 331, 518 N.E.2d 1047 (1988); *People v. Austin*, 267 Ill.App.3d 469, 641 N.E.2d 970 (1st Dist. 1994). In *Austin*, the Appellate Court held that the specific requirements for a particular aggravating factor must exist, within the meaning of the statute, for a natural life sentence to be imposed, and concluded that it is reversible error for a court to base an enhanced sentence on an aggravating factor that is not "within the meaning" of the statutory aggravating factor. *Austin*, 267 Ill.App.3d at 469, 475-76, 641 N.E.2d at 970, 974.

In the instant case, the mandatory natural life provision of the above statute does not apply because the Cook County sentencing judge did not consider and the Petitioner was not found eligible for the death penalty in the instant case. Specifically, the prosecution withdrew their request to pursue the death penalty prior to the trial and sentencing. On May 9, 1982, the date of the murder for which Petitioner was sentenced; the sentencing range was 20-40

years. (Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1)(a)). Furthermore, the Cook County jury was not instructed nor was the Petitioner charged that he had been previously convicted of the related murder of James Wright in Kane County. Finally, the prosecution withdrew their Notice of Intent to Pursue the Death Penalty, did not subsequently seek, and the Petitioner was never found eligible for the death penalty. *Contra*, *People v. Ford*, 198 Ill.2d 68, *as modified on denial of reh'g* (2001). As such, the mandatory life sentencing provision of Section 5-8-1(a)(1)(c) does not apply to the facts of the instant case, and was incorrectly applied to the instant case in the Appellate Court's opinion.

It is also clear from reviewing the relevant portions of the transcript from the sentencing hearing held on July 20, 1987, that the prosecution acknowledged that it was not seeking the death penalty, and that the court sentenced the Petitioner to the discretionary portion of Section 5-8-1(a)(1)(b), and not the mandatory portion of Section 5-8-1(a)(1)(c). App. 25-38. Consequently, this was not a sentence imposed as an alternative to the death penalty as required for Section 5-8-1(a)(1)(c) to apply, and does not fall within the meaning of the cases that fall within the parameters of Section 5-8-1(a)(1)(c) because the sentence imposed was not an alternative to the death penalty as required by Section 5-8-1(a)(1)(c). *Strayhorn*, 119 Ill.2d at 331, 518 N.E.2d at 1047; *Austin*, 267 Ill.App.3d at 469, 641 N.E.2d at 970.

CONCLUSION

For the reasons stated above, the Court should grant the instant petition and order briefing and argument in this Court.

Dated: August 27, 2008

Respectfully submitted,

ANTHONY J. SASSAN
Counsel of Record
THE LAW OFFICES OF
ANTHONY J. SASSAN
221 N. LaSalle Street,
Suite 2100
Chicago, Illinois 60601
(312) 977-9050

Attorneys for Petitioner,
Herschell Glenn

STATE OF ILLINOIS

_____ [SEAL] _____

3-05-0647 & 3-05-0648
Herschell Glenn
v. Kenneth Briley

APPELLATE COURT
THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord Two thousand seven, within and for the Third District of Illinois:

Present –

HONORABLE TOM M. LYTTON, Presiding Justice

HONORABLE MARY W. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

HONORABLE ROBERT L. CARTER, Justice

HONORABLE DANIEL L. SCHMIDT, Justice

HONORABLE VICKI R. WRIGHT, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on December 3, 2007 the Summary Order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 3 – 05 – 0647
(Consolidated with 3 – 05 – 0648)

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2007

HERSCHELL GLENN, Petitioner-Appellant, v. KENNETH BRILEY, Respondent-Appellee.	) Appeal from the) Circuit Court of the) 12th Judicial Circuit,) Will County, Illinois)) Nos. 02–MR–431) 02–MR–430)) Honorable) Edward Burmila, Jr.,) Judge, Presiding.

SUMMARY ORDER

James Wright was murdered and Lilian Final was raped and murdered on May 8, 1982. Their bodies were found on opposite sides of the Kane-Cook county line in the same Elgin woods. Consequently, Petitioner-appellant[1] Herschell Glenn was tried and convicted in Kane County for the murder of Wright in

[1] Though the *Habeas Corpus* Act contemplates a lawsuit having a plaintiff and a defendant (735 ILCS 5/10 – 101 (West 2006)), we refer to Glenn as petitioner and Briley as respondent to prevent any confusion due to the fact that Glenn was the defendant in the original criminal proceedings.

1983, and was tried and convicted in Cook County for the rape and murder Final in 1987.

The trial court in Kane County sentenced Glenn to 70 years imprisonment concluding, without the support of a jury finding, that he had killed Wright with excessive cruelty. The Cook County trial court sentenced Glenn to natural life without the possibility of parole for the death of Final, because of his prior conviction for the murder of Wright. Ill. Stat. Rev. 197 ch. 38, par. 1005 – 8 – 1(1)(b). His direct appeal on the conviction for the murder of Wright was concluded in 1986. His direct appeal on the conviction for the murder of Final was exhausted in 1992.

Glenn commenced these companion *habeas* actions in Will county, pursuant to the *Habeas Corpus* Act (735 Ill. Comp. Stat. 5/10 – 124). He alleged that the aggravating factors that caused him to be sentenced to 70 years and life respectively, were not proved to the trier of fact beyond a reasonable doubt and consequently, that his Sixth Amendment rights are being violated *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348, 62-53 (2000). Those *habeas* suits were dismissed. Glenn appeals raising various arguments. We affirm.

ANALYSIS

We may affirm the judgment of the trial court on any basis evident in the record. *People v. Johnson*, 208 Ill. 2d. 118, 128-29, 803 N.E.2d 442, 449 (2003). Setting aside the case's procedural posture (see

Schnitzer v. O'Connor, 274 Ill. App. 3d. 314, 323-24, 653 N.E.2d 825, 831-32 (1995)) and the fact that *Apprendi* is inapplicable to Glenn's claim (*Lucien v. Briley*, 213 Ill. 2d. 340, 348, 821 N.E.2d 1148, 53 (2004); *People v. de la Paz*, 204 Ill. 2d 426, 438-39, 791 N.E.2d 489, 496 (2003)), Glenn is not entitled to relief under the *Habeas Corpus* Act (the Act). Under the Act, a petitioner is not entitled to relief when he or she is incarcerated, "[b]y virtue of a final judgment of any circuit court, * * * unless the time during which such party may be legally detained has expired * * * " 735 ILCS 5/10 – 123(2) (West 2006).

Petitioner argues that the Cook County circuit court violated *Apprendi* by taking judicial notice of his prior murder conviction in Kane County. *Apprendi*, even if it were applicable, would allow the Cook County trial court to do so. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348, 62-63 (2000). Glenn is not attacking the propriety of either murder conviction, only the sentences imposed. As long as Glenn's murder conviction for the death of Wright stands, regardless of the penalty imposed for it, Glenn's term of imprisonment for the murder of Final cannot be anything less than natural life without the possibility of parole. Ill. Stat. Rev. 1978, ch. 38, par. 1005 – 8 – 1(1)(b); see 730 ILCS 5/5 – 8 –1(a)(1)(c) (West 2006). For this reason alone, the dismissal of Glenn's *habeas* suits was proper. We need not consider Glenn's other arguments.

CONCLUSION

Therefore, we affirm the judgments of the circuit court of Will County in accordance with Supreme Court Rule 23(c)(2). 16 Ill. 2d R. 23(c)(2).

Affirmed in accordance with Supreme Court Rule 23(c)(2).

SCHMIDT, J., with O'BRIEN and WRIGHT, JJ., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In testimony Whereof, I hereunto set my hand and affix the seal of the said Appellate Court at Ottawa, this 3rd day of December in the year of our Lord two thousand seven.

/s/ Gist Fleshman
Clerk of the Appellate Court

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHEL GLENN,	)	CASE NUMBER:
PETITIONER,	)	02 MR 430
	)	02 MR 431
-VS-	)	
	)	
KENNETH R. BRILEY,	)	
RESPONDENT.	)	

(Filed Mar. 1, 2006)

REPORT OF PROCEEDINGS had at the hearing of the above-entitled Cause, before the HONORABLE KATHLEEN G. KALLAN, Judge of the Twelfth Judicial Circuit, Will County, Illinois, on the 9th day of September, 2005.

APPEARANCES:

MR. ANTHONY J. SASSAN
ATTORNEY AT LAW,
Appeared on behalf of the Petitioner.

HONORABLE LISA MADIGAN
STATE OF ILLINOIS
ATTORNEY GENERAL
BY: MR. JAY P. HOFFMAN
Appeared on behalf of the Respondent.

PINKI SAMPSON
COURT SPECIALIST
14 WEST JEFFERSON STREET, #340
JOLIET, IL 60432
(815) 740-8057

[2] THE COURT: I clarified the Order the last time by denying the Motion To Reconsider.

And, we're done, gentlemen. I'm not addressing it again.

I can't get much clearer than Motion denied.

We're done.

ATTORNEY SASSAN: The issue is whether it's final, or an appealable Order, Judge. That's the issue. That's the only issue there is.

THE COURT: Issue to be decided by the Appellate Court when the Appeal is filed.

My Order is perfectly clear; Motion denied. And, it was signed a while ago.

WHICH ARE ALL THE PROCEEDINGS THAT WERE HAD

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[3] STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

I, Pinki Sampson, certify the foregoing to be a true and accurate Transcript of the electronically recorded

Testimony and Proceedings in the above-entitled Cause as authorized by Administrative Order.

/s/ P Sampson
(Signature)

Court Specialist
(Title)

STATE OF ILLINOIS)
) SS:
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHEL GLENN,	)	No. 02 MR 430 consol.
Plaintiff,	)	02 MR 431
	)	
vs	)	
	)	
KENNETH BRILEY,	)	
Defendant.	)	

(Filed Feb. 22, 2006)

REPORT OF PROCEEDINGS had in the above-entitled before the Honorable EDWARD BURMILA, Judge of the Circuit Court of Will County, Illinois, on the 12th day of September, 2005.

APPEARANCES:

MR. ANTHONY SASSAN
Attorney at Law,
Appeared on behalf of the Plaintiff;

ATTORNEY GENERAL'S OFFICE
BY: MR. JAY HOFFMAN,
Appeared on behalf of the Defendant.

TRACY HOYT, CSR
WILL COUNTY COURTHOUSE
JOLIET, ILLINOIS 60432
084-004478

[2] THE COURT: All right. Give me – you each filed – you filed a motion, you filed a response?

MR. HOFFMANN: Yes, your Honor.

THE COURT: And they're in the file?

MR. HOFFMANN: Yes, your Honor.

THE COURT: All right. Give me like 10 minutes to read that, and I'll be right back.

MR. SASSAN: If you like, Judge, I have complete transcripts of the hearings in question. There are portions attached as exhibits, but I'd be happy to delete it.

THE COURT: Mr. Attorney General?

MR. HOFFMANN: That's fine if you want to take a look at those, your Honor.

THE COURT: Okay.

MR. SASSAN: I – whether or not you need them, I don't know but I have them.

Thanks, Judge.

(Whereupon a recess was taken.)

THE COURT: And we are on the record in Glenn versus Briley, 02 MR 430 and 31 consolidated for this action. Counsel is here.

I've read the motion, looked at the transcripts. Anything that you want to add, Mr. Sassan?

MR. SASSAN: Very briefly, Judge.

[3] Just looking for a little direction. Today's the day I would have to file a Notice of Appeal if it's interpreted that the dismissal without prejudice would have disposed of all of the issues in been what's called "final and appealable order."

While my review of the record and the argument would lead me to believe it was not a final and appealable order, I would like some clarification so that I can proceed in the proper way.

THE COURT: Okay.

MR. HOFFMANN: Just, your Honor.

THE COURT: Mr. Attorney General.

MR. HOFFMANN: When we were here on Friday in your Honor's absence, we went over to Judge Kallan's office and attempted to have Judge Kallan rule on it, and she declined.

Her indication was that she had ruled – or she ruled and anything now was for the appellate court to decide.

THE COURT: Okay. Well, the Court has had the opportunity to review the motion filed and the response.

And for clarification purposes, the – this matter was assigned to this courtroom by the Chief Judge for the purpose of hearing this matter. I brought it to the attention of the Chief Judge that there was an open ruling in this case.

It was reassigned to Judge Kallan for the sole [4] purpose of her ruling on that pending motion. And then by order of the Chief, the Chief Judge directed it back to this courtroom for all further proceedings. So, I find it to be appropriately before me today under these circumstances.

Having reviewed the motion, as I said, and the response, I feel that the Attorney General's position is the appropriate one in this incidence.

I do believe that the unique circumstances by which Judge Kallan originally ruled on this motion without prejudice; that being, the pending appeals, have now been addressed.

And it is my ruling that the motion is denied and that the order that was entered was, in fact, the final and appealable order.

MR. SASSAN: Okay.

THE COURT: So, Mr. Attorney General, if you would draft an order to that effect.

And Mr. Sassan if you have a filing deadline –

MR. SASSAN: I do, Judge.

THE COURT: – then you certainly know how to proceed from there.

MR. SASSAN: Thank you, Judge.

THE COURT: You're welcome.

(Whereupon a brief pause was had.)

[5] THE COURT: I think these are your transcripts, Tony.

MR. SASSAN: Thank you, Judge.

THE COURT: Now you can do your weight lifting.

(Which were all the proceedings had.)

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[6] THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

I, TRACY HOYT, a Certified Shorthand Reporter for the Circuit Court of Will County, Twelfth Judicial Circuit of Illinois, do hereby certify the foregoing to be a true and accurate transcript of the electronic recording of the proceeding of the above entitled cause which recording contained a certification in accordance with rule or administrative order.

/s/ Tracy Hoyt
TRACY HOYT, CSR 084-004478

Dated this 10th day
of February, 2006.

STATE OF ILLINOIS)
) SS:
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHEL GLENN,	)	02 MR 430
Plaintiff,	)	02 MR 431
	)	
vs.	)	
	)	
KENNETH R. BRILEY,	)	
Defendant.	)	

(Filed Oct. 26, 2005)

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable Kathleen G. Kallan, Judge of the Circuit Court of Will County, Illinois, on the 11th day of October, A.D., 2002.

PRESENT:

Mr. Anthony J. Sassan
on behalf of the Plaintiff;

Ms. Margaret O'Connell,
Assistant Attorney General,
on behalf of the Defendant.

DANIEL C. SUPPLE, CSR (CSR# 084-002750)
Official Court Reporter
14 W. Jefferson St.
Joliet, IL 60432

* * *

[16] final judgments in these cases.

And as far as the issue of timeliness as it applies to the Kane County petition, which was dismissed, the Beauclare case does say that a Court cannot, on its own, instigate untimeliness as a reason to dismiss the petition. But it doesn't prevent the State from doing so at later time.

And it has to be pointed out that the petitioner, in the Kane County case, never pled any issue regarding timeliness. The only issues that were pled were those as they related to the retroactivity of Apprendi.

So, based upon the reasons stated here in court and those in our written 2-619 motions, we respectfully request that this Court not allow these matters to go forward here in Will County.

THE COURT: Okay. With regard to the Kane County case, the Second District case, that's 431?

MS. O'CONNELL: Yes.

THE COURT: While it was a creative argument, it seems clear to me that an appeal involving these parties and these issues, in the Second District, would preclude us from going forward in the Third District. The motion to dismiss is allowed.

[17] Okay. On the 430, which is the Cook County case, both parties are in agreement that that appeal has been dismissed?

MS. O'CONNELL: Yes. I will take counsel's –

MR. SASSAN: Judge, I am sorry. I was writing something down. We filed a motion. The State has objected. We filed –

THE COURT: So it hasn't been dismissed?

MR. SASSAN: An order has not been entered. We filed a motion, but there has been subsequent briefs filed. We are waiting for that order. I called yesterday.

THE COURT: So, in fact, 430 isn't exactly the same posture as 431.

Is the First District appeal pending?

MR. SASSAN: As it stands.

THE COURT: As it stands today. Well, today is the date. Okay. All right. If, in fact, that appeal is still pending, then 430 is also going to be dismissed.

MR. SASSAN: Okay.

THE COURT: Because it's inappropriate to have either of these in Will County while the First and Second District deal with them.

MR. SASSAN: Are those orders, based upon the status [18] of the First District, is that order entered without prejudice?

THE COURT: They are both without prejudice. The time may come when a habeas corpus

petition will be brought to Will County if he is incarcerated in Stateville, but right now isn't the time. The appeal is pending in Kane and Cook County. So the 219 motions are going to end both cases. Okay.

MR. SASSAN: And then if it ever comes back, we will deal with the other issues?

THE COURT: That's right. Okay.

MR. SASSAN: Okay. Thank you, Judge.

(Which were all the proceedings had in the above-entitled cause.)

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[19] IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

I, Daniel C. Supple, an Official Court Reporter for the Circuit Court of Will County, Twelfth Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable Barbara J. Badger, Judge of said court.

/s/ Daniel C. Supple
Daniel C. Supple, CSR
Official Court Reporter
(CSR #084-002750)

Dated this 19th day
of October, 2005.

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS

02 MR 430
CASE NO: 02 MR 431

Kenneth Briley
Defendant(s)

COURT ORDER

(Filed Aug. 12, 2005)

This matter coming on for a ruling to clarify the court's previous order that Petitioner motion to reconsider the dismissal of the habeas petitions pursuant to Respondent's 2-619 motions. It is Hereby Ordered: Petitioner's Motion to reconsider is Denied. The case is referred to The Honorable Judge Burmilla

Name: Jay P. Hoffmann
Attorney For: Respondent
ARDC#: Atty Gen. Office
Address: 100 W Randolph
City: Chicago, IL
Telephone: (312) 814-3421

Date: 8-12, 2005

Entered: Kathy Kallan
Judge

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS

02 MR 430
CASE NO: 02 MR 431

Kenneth Briley
Defendant(s)

COURT ORDER

(Filed Aug. 12, 2005)

This matter comes before the Court following Judge Kallan's ruling which denied Petitioner's motion to reconsider the dismissal without prejudice of the instant habeas petitions pursuant to Respondent's 2-619 motions

The Court finds that the cases have been dismissed without prejudice, therefore, no further consideration is warranted at this time.

Name: Jay P. Hoffmann
Attorney For: Respondent
ARDC#: Atty Gen. Office
Address: 100 W Randolph
City: Chicago, IL
Telephone: (312) 814-3421

Date: AUG 12, 2005

Entered: Kathy Kallan
Judge

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS

02 MR 431
CASE NO: 02 MR 430

Kenneth Briley
Defendant(s)

COURT ORDER

(Filed Aug. 12, 2005)

This matter is reassigned by the Chief Judge to the Honorable Kathleen Kallan for ruling today to clarify he previous orders regarding consideration of Petitioner's motion to reconsider the dismissal of his habeas petitions pursuant to Respondent's 2-619 motions.

Name: Jay P. Hoffmann
Attorney For: Respondent
ARDC#: Atty Gen. Office
Address: 100 W Randolph
City: Chicago, IL
Telephone: (312) 814-3421

Date: AUG 12, 2005

Entered: Kathy Kallan
Judge

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS CASE NO: 02 MR 430

Kenneth Briley
Defendant(s)

COURT ORDER

This matter coming to be heard on the Court's state habeas call all parties having notice and the Court being fully advised, it is hereby ordered:

[1] Motion to Reconsider is held in abeyance

[2] Hearing on Respondent's 2-615 Motion is set for 1/10/03 at 10:30

Name: M O'Connell
Attorney For: Resp
ARDC#:
Address: 100 W Randolph St
City: Chicago, IL 60601
Telephone:

Date: 12/13, 2002

Entered: Kathy Kallan
Judge

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS CASE NO: 02 MR 430

Kenneth Briley
Defendant(s)

COURT ORDER

(Filed Oct. 11, 2002)

This matter coming to be heard on the States Habeas Call, all parties having notice and the Court being fully advised, it is hereby ordered:

After a hearing on Respondent's 2-619 Motion, said Motion is hereby granted.

Case dismissed, without prejudice.

Name: M O'Connell Date: 10/11, 2002
Attorney For: Resp
ARDC#:
Address:
City:
Telephone:

Entered: Kathy Kallan
Judge

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, ILLINOIS

Herschell Glenn
Plaintiff(s)

VS CASE NO: 02 MR 431

Kenneth Briley
Defendant(s)

COURT ORDER

(Filed Oct. 11, 2002)

This matter coming to be heard on the Court's state habeas call, all parties having notice and the Court being fully advised, it is hereby ordered:

After a hearing on Respondent's 2-619 Motion, said Motion is hereby granted.

CASE DISMISSED, without prejudice.

Name: M O'Connell Date: 10/11, 2002
Attorney For: Resp
ARDC#:
Address:
City:
Telephone:

Entered: Kathy Kallan
Judge

ySTATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF THE
COOK JUDICIAL CIRCUIT
COUNTY DEPARTMENT – CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 83 C 3503
HERSCHEL GLENN,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS of the hearing had before the HONORABLE EDWARD M. FIALA, JR., Judge of the Circuit Court, on the 20th day of July, 1987, in the Circuit Court of Cook County, 5600 Old Orchard Road, Skokie, Illinois, Chicago, Illinois.

[2] APPEARANCES:

HON. RICHARD M. DALEY
State's Attorney of Cook County, by:
MR. BRUCE PAYNTER, and
MR. ALPHONSE TOMASO,
Assistant State's Attorneys,
appeared on behalf of
People of the State of Illinois;

HON. PAUL M. BIEBEL, JR.,
Public Defender of Cook County, by:
MR. ALLAN SINCOX, and
MR. DALE COVENTRY,
Assistant Public Defenders
appeared on behalf of the
Defendant.

[3] THE CLERK: Cause of the People of the State of Illinois vs. Herschel Glenn.

THE COURT: Thank you. I'm going to ask counsel to kindly identify themselves for my record, please.

MR. PAYNTER: Bruce Paynter and Al Tomaso on behalf of the People.

MR. SINCOX: Allan Sincox and Dale Coventry on behalf of Mr. Glenn.

THE COURT: I'm going to ask that – if we have everyone ready, why don't we have the benefit of Mr. Glenn.

Let the record reflect that the Defendant Herschel Glenn is present in open court.

The record shall further reflect that on May 13, 1987, the defendant Herschel Glenn was found guilty of the murder of Lillian Final and the rape of Lillian Final. The cause was continued to June 22, 1987, for hearing on post-trial motions and/or sentencing and thereafter continued by agreement to today's date, today's date being July 20th, 1987.

The record is going to reflect further that this Court has received a motion for judgment [4] notwithstanding the verdict or in the alternative for a new trial. I've been furnished with that in advance and I have read and I am conversant with that particular motion. The state has filed a sentencing memorandum which I'll not consider at this time.

MR. SINCOX: I personally direct this Court's attention to motion for judgment notwithstanding a verdict or in the alternative for a new trial.

THE COURT: Mr. State's Attorney, have you received a copy of that motion?

MR. PAYNTER: Yes, your Honor.

THE COURT: Would the People be prepared to argue that motion?

MR. PAYNTER: Yes.

THE COURT: Very well.

MR. SINCOX: Judge, I would indicate that I haven't formally filed this motion previously on this, although I have previously tendered it. I would ask leave to file this at this time.

THE COURT: That is granted, of course.

Are you prepared to proceed, Counselor?

MR. SINCOX: Judge, I am prepared to proceed, and I would indicate for the record that the

[5] written motion which we filed, the written post-trial motion that we filed at this point is, I think, self-explanatory and at least as clear as we could possibly make it. With respect to the points raised, all of these points were raised at various times throughout the trial and were argued extensively at that point. Accordingly, I don't see any need for additional argument in support of them at this time. I would simply stand on the written motion as filed.

THE COURT: Mr. State's Attorney?

MR. PAYNTER: Judge, again, I will not respond to the defendant's motion other than state that several of the points here are just standard allegations and as to the failure to specify exactly as to what set of circumstances or what issue gives rise to the error, I would object to lack of specificity. Other than that, I have no comment.

THE COURT: Very well. I take it you have nothing further on behalf of Mr. Glenn, is that correct?

MR. SINCOX: Well, I don't, Judge, except that I do think if the state has some objection to [6] the lack of specificity, I thought we were relatively specific about all these given numbers of instructions and that type of thing, so that I thought that it was relatively specific, and it would seem to me that if the state has some objection to specificity with respect to this point, they should make that with more specificity.

MR. PAYNTER: Well, Judge, I will respond to that. Judge, as far as to give a couple of examples, Paragraph 4, 5, and 6, although it alleges that the Court erred in denying various motions, does not set out a basis for the allegation of error on the Court's part. Obviously, one of the purposes for a motion for new trial is to alert the Court to possible areas of error so that the Court if it feels necessary may direct that at the trial level, and I think if the Court goes through that, it will notice that although there are certain, as Mr. Sincox points out, paragraphs such as 18 where he specifically lists the numbers of the questions that the Court refused to give during the jury selection process, there are a number of paragraphs dealing with the [7] motions that fail to state where the Court committed error in denying those motions, and as to that, I would not waive any lack of specificity.

THE COURT: Well, this Court has received the motion, as I've indicated, into the record, and I've reflected upon that motion very carefully. The motions consists of 25 paragraphs. I have reflected upon each and every paragraph separately. I am very well conversant with the trial record and the many motions this Court had to deal with over the years. I've reviewed all those motions in preparation for the trial as well, and considering the remarks of counsel, on the totality of all of the foregoing, a motion for judgment notwithstanding the verdict or in the alternative for a new trial be and the same hereby is denied and denied in toto.

Now, before we get into the sentencing phase, gentlemen, as you know, there was a presentencing investigation, and Mr. Sincox, Mr. Coventry, have you read the presentence investigation?

MR. SINCOX: We have your Honor.

[8] THE COURT: Mr. State's Attorney, have you, Mr. Paynter, Mr. Tomaso, gentlemen, read the presentence investigation?

MR. PAYNTER: We have, your Honor.

THE COURT: I shall indicate, gentlemen, I have read it as well. The state has filed with respect to the sentencing phase of these proceedings a sentencing memorandum filed on this date, and Mr. Sincox, Mr. Coventry, have you received copies of that sentencing memorandum?

MR. SINCOX: Yes, Judge.

MR. PAYNTER: Your Honor, while the Court was proceeding on the motion for new trial, I found two errors. I'd like to make the changes on the Court's copy, if I may.

THE COURT: Of course you can. To what extent?

MR. PAYNTER: If I could just amend it on the face, your Honor. I'll do the same for the Public Defender's Office.

Your Honor. I would indicate that changes as to the introductory paragraph have been handwritten,

have been amended by hand, and a change as to Paragraph 6A has been amended by [9] hand.

THE COURT: Would you read Paragraph 6A as amended into our record?

MR. PAYNTER: 6A as amended, that the crime involved an assertion of the defendant's authority as a member of the Elgin Police Department.

THE COURT: And, Mr. Sincox, have you corrected your copy of the sentencing memorandum filed by the State accordingly?

MR. SINCOX: I have, your Honor.

THE COURT: Thank you very much.

Mr. State's Attorney, I presume you have no further amendments with respect to your sentencing memorandum.

MR. PAYNTER: Correct, Judge.

THE COURT: Both sides having read the PSI of record, anything by way of aggravation from the State?

MR. PAYNTER: Your Honor, I think more than any trial I can recall, this Court is extremely conversant with all of the facts and circumstances. I think the particular areas of the statutory aggravation and the sentencing alternatives are laid out adequately in the [10] sentencing memorandum, although I'm certain that the Court did not need the citation to know what the appropriate areas of the

law are. I think that the circumstances of this particular trial having been on this Court's call for almost four years puts it in a peculiar area to evaluate the evidence – peculiar advantage, I should say, and I would add that with respect to the People's position regarding the various sentencing alternatives, that they are dealt with with specificity in the sentencing memorandum.

In particular I draw the Court's attention to Paragraph 6A, B, and C, they adequately set forth the statutory basis for imposition of a particular sentence and are consistent with the grounds rules, so to speak, laid out by the Court prior to trial and the ground rules which both the People and the defense knew to be in existence during the course of the trial. I would rest upon the statutory citations contained within our memorandum.

THE COURT: Thank you. Mr. Sincox, by way of mitigation, please?

MR. SINCOX: Thank you.

[11] Your Honor, I would just mention up front that with respect to the State's sentencing memorandum, we would, of course, object to Paragraph 6, particularly, and indicate that – indicate our opposition to that particular portion. It seems to me that the parts that the State relies on in support of that were in fact not really supported by the record, and so I would object to that.

Beyond that, I would certainly agree with the State's Attorney in the sense that the Court has had before you probably more information than a Court generally has with respect to background and history and mental state and so forth of a criminal defendant, probably more so than at least in most cases. You have in addition the benefit of a presentence report which I think helps to summarize. I don't think it's by any means complete when you consider all the other information that you have, but it certainly gives you somewhere to go, at least some general outline as to what his background was.

The only thing I would ask to correct with respect to that presentence report is an [12] inference that I think probably was unintentionally given in the report under the heading of employment. There is an indication that Mr. Glenn had formed a mail order company, an amusement or games company, and the manner in which it's written I think suggests that he had just recently formed that company and perhaps had even done so after the carbon monoxide incident which was the subject of the trial. In fact, that was not true, and in fact I do have several documents here, your Honor.

THE COURT: What are those documents, Counselor?

MR. SINCOX: The two companies that we're talking about were a mail order company in which he was attempting to sell lists of names of persons for advertisement purposes. He was not

particularly successful with it. It was started in 1981 long before this incident ever occurred, and basically went nowhere.

The same is also true of the amusement company. He was in the process of trying to get a game room open before the carbon monoxide incident ever happened, and in fact after the carbon [13] monoxide incident happened there was some indications that he was not paying much attention to his business, was not cashing checks, and was not sending things out as he should have been, but that particular company was also formed in 1981, and I just wanted to make that clear for the record.

If the State or the Court wishes to look at any of those documents, you are welcome to.

MR. PAYNTER: No, thank you.

MR. SINCOX: I just wanted to make that clear.

THE COURT: Do you have any other amendments, Mr. Sincox, relative to the PSI?

MR. SINCOX: I don't, Judge. I think that everything else is essentially accurate. As I say, I don't think it's complete, because of the fact that there was certainly a tremendous amount of medical evidence during the course of the trial, but because you did hear it during the course of the trial, I don't think you need – there is any need for any sort of amendments to the presentence investigation.

[14] THE COURT: Thank you, Mr. Sincox.

MR. PAYNTER: I meant to attach to the People's sentencing memorandum this certified copy of conviction relating to Case No. 82 CF 499, and I would ask that it be considered a part of the sentencing memorandum or I also just made it a part of the court file.

THE COURT: That was a sentencing in Kane Country, is that correct?

MR. PAYNTER: That's right.

THE COURT: That was alluded to in your Paragraph –

MR. PAYNTER: Paragraph 1, your Honor.

THE COURT: – Paragraph 1, correct, thank you, Counselor.

I take it, Mr. Sincox, Mr. Coventry, you have seen that.

MR. SINCOX: I haven't actually seen it, Judge, but it's a certified copy –

THE COURT: Would you wish –

MR. SINCOX: – of that conviction. We've been aware of that conviction for some time.

THE COURT: If you would give me one moment just to familiarize myself with this.

[15] Oh, yes.

Very well, Mr. Glenn, do you have anything to say to this Court before this Court pronounces sentence upon you?

MR. GLENN: No, your Honor.

THE COURT: Thank you.

This Court has considered all of the factors before me, I very carefully considered those factors in aggravation and mitigation, and I have considered those factors as enunciated in Chapter 38 as are applicable to this particular case, again, in aggravation and mitigation. I have reflected upon the now amended PSI, and I have considered those amendments as well, and I have considered the remarks of Mr. Paynter on behalf of the State of Illinois, and I've considered his memorandum of sentencing and as appended now the clerk's certificate from Kane County relative to the imposition of a sentence by his Honor Judge Clark in that county.

I've considered the remarks of Mr. Sincox, and and I've considered the circumstances of this case very, very carefully, and I've weighed this case very carefully. This case has [16] been before me a long time. I've heard many, many judgments, and there was a long trial. I've had the benefit of psychiatric testimony both for the defense and the state, and all of these factors were considered by me. I have also considered factors of rehabilitation, I've considered the age of the defendant, and his background, and I've considered all of this as augmented by the evidence that was adduced during the course of this trial

that was accepted into evidence, so my sentence, again, and findings shall be predicated an a totality of all of these factors.

Herschel Glenn, for the offense of the murder of Lillian Final for which you stand convicted you are sentenced to the Illinois Department of Corrections, Penitentiary Division, for your natural life. For the rape of Lillian Final for which you stand convicted, you are sentenced to the Illinois Department of Corrections for a term of 30 years. This sentence will be concurrent with the sentence of natural life that I have just imposed.

This Court has weighed the issue of consecutive or concurrent sentences, whether these [17] sentences that I just imposed upon you should be concurrent or consecutive to the sentence imposed in Kane County. It is the order of this Court and finding of this Court that the sentence of natural life for the murder of Lillian Final and the sentence of 30 years for the rape of Lillian Final be concurrent with the sentence imposed in Kane County, with more particularity 82 CF 499. Judgment is entered upon each of these sentences and mittimus shall issue.

Mr. Glenn, you have the absolute right of appeal, and I shall appoint the State Appellate Defender to represent your interests for the purpose of perfecting an appeal. You shall be awarded and be given free transcripts of all the proceedings, motions, including this sentencing hearing. You must file or cause to be filed on your behalf within 30 days from today a

notice of appeal, and you have an absolute right to counsel. I have already appointed counsel for your benefit.

MR. SINCOX: Excuse me, your Honor, I would just indicate for the record I have spoken to Mr. Glenn previous to this and discussed not only

* * *

[21] STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF THE
COOK JUDICIAL CIRCUIT
COUNTY DEPARTMENT – CRIMINAL DIVISION

I, Susan G. Walsh, Certified Shorthand Reporter, do hereby certify that I reported in shorthand the proceedings had at the hearing in the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the Report of Proceedings had before JUDGE EDWARD M. FIALA, JR.

/s/ Susan G. Walsh
Illinois CSR License 084-001828

Dated this 9th day of March, 2002.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. HERSCHEL GLENN, Defendant.	)	No. 82 CF 499

REPORT OF PROCEEDINGS

at the hearing of the above-entitled cause before the HONORABLE JOSEPH T. McCARTHY, Judge of said court, at Courtroom 340, Kane County Courthouse, Geneva, Illinois on June 16, 1983.

[2] APPEARANCES:

MR. ROBERT J. MORROW
STATE'S ATTORNEY FOR KANE COUNTY

Appeared on behalf of the People of the State of Illinois;

MR. JULIUS L. SHERWIN

Appeared on behalf of the Defendant, Herschel Glenn.

DEFENDANT PRESENT IN OPEN COURT

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[35] motion, may I suggest and state that from time to time during the trial each of these points were brought up and they were most ably presented by both sides. They were vigorously pursued and argued, cases were presented, a great deal of research was done by both sides. The Court listened attentively to those argument, I gave due consideration to them, I

read the cases and then ruled, and I have heard nothing today that would change my mind in this way. For that reason, the motion of the defendant for a new trial will be denied.

Now then –

MR. MORROW: Your Honor, I believe the motion is in the alternative.

THE COURT: Or in the alternative, yes. I don't have that before me.

MR. MORROW: In the alternative for a judgment of acquittal.

THE COURT: Judgment of acquittal, yes. So the motion in its entirety will be denied.

Now then, gentlemen, may I ask this, first of Mr. Sherwin, has the defendant received a copy of the presentence report, sir?

MR. SHERWIN: He has, and I've afforded him an [36] opportunity to read it, and before Your Honor indicates what the sentence should be you may want to hear from Mr. Morrow or myself or both of us. My comments –

THE COURT: I will do that, sir. I would first just –

MR. SHERWIN: It has been received.

THE COURT: – confirm for the record that you have received it, that you have had it for –

MR. SHERWIN: About a week.

THE COURT: About a week. All right.

MR. SHERWIN: It was time enough because it is a fine and exhaustive report.

THE COURT: And at this time –

MR. SHERWIN: It reflects favorably upon my client's past history.

THE COURT: At this time do you have any amendments or changes or corrections to make of any kind, sir?

MR. SHERWIN: No additions or corrections –

THE COURT: Very well.

MR. SHERWIN: – or challenges thereto are being raised by the defendant.

THE COURT: All right. And Mr. Morrow? Has the State received a copy of the presentence report?

[37] MR. MORROW: Yes, we have, Your Honor.

THE COURT: Does the State have any additions, amendments or corrections to make?

MR. MORROW: No, I do not.

THE COURT: Very well. At this time, gentlemen, the Court will entertain such matters of

mitigation and aggravation as either side chooses to present.

Mr. Sherwin?

MR. SHERWIN: Your Honor, Your Honor knows all about the defendant from the time of his birth to the divorce of his parents at age six, and you've heard enough evidence about the fact that he had an illustrious career, he's one of the few persons of his race in the Elgin Police Department, and the newspaper account was to the effect that his commanding officer, the chief of the Elgin police, was shocked to hear of his involvement. There is nothing in his background except for this offense that reflects unfavorably upon the defendant. The summary contained in paragraph 12 is that he doesn't have a record of juvenile delinquency or any convictions as an adult.

He fathered a five-year old child, he had two years of college education, he was a good police [38] officer. But for the grace of God he shouldn't have been sitting here, but it is one of these unfortunate things. It is, in my respectful judgment, and I urge it to Your Honor, one of the cleanest sheets that could ever be presented by an adult probation officer, Diretha, D-i-r-e-t-h-a, Dumas. It speaks for itself.

I ask your Honor to take into account, it may be a little insulting to say, this is the only offense he ever committed. It's a serious one, but that should be taken into account, I respectfully urge, in assessing

what penalty may be requested by Mr. Morrow and ruled upon by the Court.

THE COURT: Thank you, sir.

Mr. Morrow?

MR. MORROW: Your Honor, there are three alternatives I believe the Court has in sentencing this defendant. As the Court knows, this is a nonprobationable offense, the offense of murder. Under normal sentencing standards it would call for a 20 to 40-year term, a determinate term within that range, in the Department of Corrections. If the factors in aggravation relating to extended term are established, that time can be doubled and go to 40 to 80 years, a determinate term within that range. If the Court finds [39] that the offense in this case was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, that's one of the factors for extended term, the Court can, if it makes that finding, sentence this defendant to a term of natural life imprisonment without parole. Those are the three alternatives the Court has, I believe.

I would cite for the Court's consideration certain factors of aggravation, these being in addition to all of the evidence that the Court heard in this case, 33 witnesses presented by the State, 60 items of physical evidence relating to ballistics, blood, identification of the defendant as standing over the body of James Wright by witnesses Freemon and Burnes, defendant's wallet found about 12 feet from the body of James Wright, the testimony of the six witnesses at

the Ramada Inn concerning the opinion that he was not intoxicated at the time.

The evidence presented at trial showed that this conduct was of a deliberate and calculated nature, including the calling in to the police department that his wallet was missing, reporting it missing that evening, which be lies a state of mind that would argue that he was not in control of himself. [40] or capable of distinguishing right from wrong, the story he gave the police about shooting raccoons to establish the fact that if the gun were recovered that it had been fired, the change of clothing that evening to arguably hide the fact that there were blood stains on the clothing from the first set that was worn, all of these facts in evidence.

Perhaps the fact that is most telling, I think, with regard to the factor of aggravation concerning exceptionally brutal or heinous behavior, the fact that the defendant in this case, and there was considerable scientific evidence that supported this, the murder weapon involved was a five-shot revolver. The defendant or the victim in this case, James Wright, the evidence showed, received seven separate bullet wounds to the body indicating that the gun had to be reloaded to put the rounds of bullets into him. Three of the seven shots were shots to the head, one in the right ear area, one to the forward area of the right ear, one direct point-blank shot just to the right of the victim's nose.

The fact that this defendant is a police officer who is familiar with wounds and trauma and familiar with weapons, is familiar with the caliber of [41] the type of weapons he's got in his hand, that these are .38 caliber shells, not smaller ranges, .25 caliber, indicating – the facts would indicate, and this was supported by the testimony of Dr. Berry at trial, that any one of these three shots to the head of James Wright would have killed him. We had three shots administered by someone who knows something about shots. This isn't an hysterical and frightened housewife who is repelling an intruder and who closes her eyes and points a gun and kept shooting till it stops shooting because she's scared and she doesn't know that much about guns, this is a person trained in the use of weapons and who administered severe and multiple gunshot wounds requiring reloading to this victim, James Wight.

So all of those facts in this case I think support a finding by this Court that the conduct in this offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

There are two other factors that I would like the Court to take into consideration first to the facts in this case, and they are found in the sentencing statute, Section 1005-5-3.2, factors in aggravation, subparagraph four. That the defendant, by [42] the duties of his office and position, was obliged to prevent an offense. And I think that that language could bring to the fact that the defendant here at the time of the offense was a sworn police officer, sworn by

choice and by career to uphold the laws of our State and not to violate them. I think this is a factor of aggravation that this defendant, by duty of his office or position, was obliged to prevent the offense.

In subparagraph six in that same section, that the defendant, another factor of aggravation, used his position in the community to commit the offense or to afford himself an easier means of committing the offense.

I think that the evidence in this case, if you recall the testimony concerning the El Camino automobile of James Wright, that the door was ajar, that the wallet was on the seat, that the social security card was lying out, the wallet was lying open, and that the license, the drivers license of James Wright was found in his rear pocket at the death scene, all of which, I suggest, supports a theory of the case that was advanced by the prosecution in this trial that the defendant came upon James Wright in Lord's Park, and that, I submit, that the [43] circumstantial evidence exists that he used his office or badge or sign of authority to ask for or to see Mr. Wright's license, and that Mr. Wright opened the wallet, and that's why it was found the way it was found, and that he did in act, this defendant, use his position in the community to afford him an easier means of committing this offense.

I think all of these factors aggravate this offense, and at this time the State would recommend as a

sentence in this case that the defendant be sentenced to a term of natural life imprisonment.

THE COURT: I would first say that the responsibilities and functions and duties of this Court are numerous and varied from time to time. Some are pleasant, some are satisfying, and hopefully fruitful and productive.

MR. MORROW: Your Honor, if I could approach –

THE COURT: Oh, yes, I wanted to do something, yes, before that.

Mr. Glenn, I neglected to suggest to you that the Court would entertain any statements that you might wish to make at this time, sir.

MR. SHERWIN: In very brief reply, we did hear [44] everything that was stated by Mr. Morrow, and particularly that portion where he said it was a five-shot, that the cylinder contained five live shells and had to be reloaded to effectively explode or trigger a total of seven shots that were found in the body of the deceased. The immediate reaction of an individual would be he ought to be out of his mind to do that a thing like that.

The further test of that fact is that when he permitted the ejected shells to lie on the scene, which were very easily accessible, and the fact that he, when interrogated, realized that he was in some trouble and gave a fictitious story, he never admitted he committed these offenses.

The reference is made to the fact that he was not under the influence of having ingested alcoholic beverages testified to, as Mr. Morrow said, by these people. You must take into account, and you may not, it dehors the record, as they say, that the City of Elgin and Ramada Inn, in two separate suits, are being sued for $1 million by the administrators of the estate, one under the Dram Shop Act and the other under a deprivation of the civil rights of Mr. Wright. Had they not, the Elgin Police Department, had they [45] taken steps to reevaluate him before he was put back to work, the defendant wouldn't be here. Certainly not in his capacity as a police officer. But they took him back to work and they have to share the responsibility, not only financial but for the situation that subsequently arose.

It was interesting to observe that when on strike duty, on special assignment, he had a fellow police officer – what was his name?

THE DEFENDANT: David Dingel.

MR. SHERWIN: Dingel. Mr. Dingel. Now he says Dingel; it rings a bell.

He said they ingested after their work about five shots of liquor and that he had to guide the defendant home at ten miles an hour, whereas the evidence in this case is and all the witnesses said he was stark stone sober, or substantially in that condition, after ingesting two prior – two shots of 100 proof rum and then changed to five shots of Black Label, Johnnie Walker Black label. When he followed a lady entertainer

into the room, he was not acting rationally. And of course when he was later seen at 4:30, being about 4-1/2 hours after the ingestion of this liquor, he said he drove the short [46] distance to the police station without colliding with anybody. There is a difference in the facts. They would like you to believe that he wasn't affected by the alcohol.

The fact still remains that Officer Dingel testified, as five other officers, including Captain Phortmiller and his Chief, that he had a good general reputation for being a peaceful and law-abiding citizen. This man was out of his, as the common phrasing, out of his cotton picking mind. He laid out the best case a defendant could have laid out if he went out of his way to do it, and then knowing his rights under the application of Miranda vs. Arizona, the rights, the Miranda rights, he said you don't have to answer, you have a right to remain silent and he gave them two fictitious stories. You are immune from a search. You have a right to a lawyer. He signed a consent to a search which produced the gun that tied him up with the shooting. All of this is the conduct of a man who is not rational, and I attribute it all to the diseased mentality that resulted from this carbon monoxide poisoning. That is a mitigating factor that must strongly influence the Court in not following the recommendation of natural [47] life imprisonment.

He should be afforded an opportunity with whatever punishment you impose, at the tender age of what, 34 now?

THE DEFENDANT: 25.

MR. SHERWIN: How old?

THE DEFENDANT: 25.

MR. SHERWIN: 25. Well, even his lawyer gets a little mixed up and I don't even drink.

At 25, if he's given a lesser sentence, mindful of the economic situations that prevail, he ought to come out, and as the late respected – not late, the respected Joseph Burke, who was once the oldest Judge in the First Judicial District, he would sentence a man to a period of time so that when he got out he was 50, he says because at that point you can't teach an old dog new tricks.

I had once suggested to Mr. Morrow that they impose a sentence of the minimum term of 20, and in talking about it even suggested 30. But I find that he's in a sensitive position as the representative of the people of Kane County, who very wisely elected him. A 30-year sentence, and in suggesting that I am not suggesting that he has had the trial about which we [48] complained nor waiving any errors asserted. "Natural life is an unreasonable request under all of the facts that Your Honor heard and knows about.

Thank you.

THE. COURT: Mr. Glenn, would you care to address the Court at this time?

MR. SHERWIN: Pardon me?

THE COURT: I asked your client if he'd care to address the Court at this time.

You do not have to do so, sir, but I would give you that opportunity.

MR. SHERWIN: Have you got anything to say? You can tell him.

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Thank you, sir.

Well, I suggested before that sometimes it is a rather pleasant and satisfying experience to be in my position, and all other judges I'm sure would agree with this, while at other times, such as this, the responsibility and burden that's thrust upon a judge are personally unpleasant and difficult and unrewarding and even depressing.

The State's Attorney this afternoon has stated three alternatives available to the Court in [49] this case. First, the imprisonment of 20 to 40 years; second, an extended term of 40 to 80 years, and third, by reason of the factors stated, natural life. In determining which of these alternatives would be most appropriate, the Court must take into consideration matters of mitigation and aggravation.

During this trial witnesses have appeared to tell us about a Herschel Glenn who was a loving son, who was a good police officer. The presentence report tells this Court about a Herschel Glenn who had no juvenile record, who had no past adult criminal record,

who has no drug or alcohol problems, who had strong family ties. I see and observe a young man who is a fine looking young man, a handsome young man, healthy and intelligent, a young man who has the potential for rehabilitation.

Also, however, we have a young man who, in the early morning hours of May 8th, 1982, betrayed his fellow officers, splashing them with the bloody stain of dastardly conduct, betrayed his community, the community which had accepted him not only as an equal but as a trusted and distinguished servant, he betrayed himself, his friends and his family, a young man who on this occasion succumbed to animal instincts [50] resulting in the offense of murder, accompanied, in my opinion, by exceptionally brutal behavior indicative of wanton cruelty.

Mr. Glenn, your victim's body was riddled by seven bullets, four in the right arm, three in the head, any one of which, according to the pathologist, could have resulted in the death of your victim, James Wright. This to me reflects a cold and calculated and extremely brutal conduct, one which was shockingly evil and grossly ruthless and callous, completely devoid of any mercy or compassion.

At this time then, having considered the recommendation of the State's Attorney, which I do not find to be without basis, the arguments of both Counsel, presentence report, matters of aggravation and mitigation as set forth in the Uniform Commercial Code, which I must review, which must be a guide to

this Court, judgment having previously been entered on a finding of guilty by a jury, it is the judgment of this Court that you, Mr. Glenn, be sentenced to the Illinois penitentiary system under the Illinois Department of Corrections for a determinate term of 70 years.

At this time I would admonish you, sir, that you have a right, within 30 days of this date, to [51] file a written motion herein asking that my judgment be set aside and vacated. Any grounds left out of that motion will be deemed to be waived. For the purposes of preparing and presenting that motion you're entitled to the services of an attorney and the use of such transcripts as may be necessary, and if you're unable to afford either those services or transcripts they will be furnished to you at no cost. If that motion is granted, depending on what the motion might be, there is a possibility of another trial in this case. If the motion were denied, you then have 30 days to file an appeal to the Illinois Appellate Court, and again in this regard you have the right to retain the services of an attorney and the use of such transcripts as are necessary to prepare and perfect that appeal. And again if you're unable to afford either those services or court records they will be furnished to you at no cost.

MR. SHERWIN: May I address you briefly, Your Honor?

THE COURT: Yes, sir.

MR. SHERWIN: Because of the necessity of some personal necessity, because of the delay, this originally having been set from 11:00 to 3:00, I will, [52] pursuant to arrangement with Mr. Morrow, present a motion supported by an economic report suggesting to the Court the appointment of the State Appellate Defender, but I don't believe it would be timely. I want to give it some thought. I want to talk to his parents. He's without means.

THE COURT: Very well.

MR. SHERWIN: Thank you very much, Your Honor.

THE COURT: Yes. At this time the Court would direct the Clerk to make out the appropriate matters. All right.

(Which were all the proceedings had at the aforesaid time and place.

[53] STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

I, Mary Kay (Martensen) Ballo, CSR, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and accurate transcript of the proceedings at said hearing as appears from my

stenographic notes so taken and transcribed under my personal direction.

/s/ Mary Kay Ballo
Certified Shorthand Reporter
CSR NO. 084-001120

STATE OF ILLINOIS

[SEAL]

APPELLATE COURT THIRD DISTRICT

OTTAWA

A NOTICE OF ISSUANCE OF MANDATE

DATE: 07/28/08

TO: Mr. Anthony J. Sassan
The Law Offices of Anthony J. Sassan
221 N. LaSalle Street, Suite 2100
Chicago, IL 60601

CASE NO. 3-05-0647 consolidated with 3-05-0648

Circuit Court No. 02MR430

TITLE: 3-05-0647 (02MR431)
CONSOLIDATED WITH:
3-05-0648 (02MR430)
Herschell Glenn,
Appellant,
v.
Kenneth Briley,
Appellee.

This is to notify you that, pursuant to Supreme Court Rule 368, the Mandate in the above cause has been issued to the Clerk of the Circuit Court for filing.

/s/ Gist Fleshman
Clerk of the Appellate Court

STATE OF ILLINOIS

THIRD DISTRICT APPELLATE COURT

[LOGO]

Gist Fleshman
Clerk of the Court
815 434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815 434-5068

Be it remembered, That, to wit: On the 15th day of January 2008, certain proceedings were had and orders made and entered record by said Court, among which is the following, viz:

3-05-0647 (cons. w/3-05-648)

Herschell Glenn,	APPEAL FROM:
Appellee,	Will County
v.	Hon. Edward Burmila
Kenneth Briley,	Hon. Kathleen Kallan
Appellant.	02MR430
	02MR431

Now on this day this cause coming on for hearing upon the petition for rehearing filed by the Appellant herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ Gist Fleshman
Clerk of the Court

106059

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 29, 2008

Mr. Anthony J. Sassan
The Law Offices of Anthony J. Sassan
221 North LaSalle Street
Suite 2100
Chicago, IL 60601

No. 106059 – Herschell Glenn, petitioner, v. Kenneth Briley, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 3, 2008.

STATE OF ILLINOIS)
) SS:
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHEL[L] GLENN,	)	
Petitioner,	)	2002 MR 430
vs.	)	2002 MR 431
KENNETH R. BRILEY,	)	
Respondent.	)	

(Filed Mar. 1, 2006)

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE RICHARD J. SIEGEL, on the 9th day of September, 2005.

APPEARANCES:

MR. ANTHONY J. SASSAN,
Attorney at Law,
Appeared on behalf of the Petitioner;

HON. LISA MADIGAN
STATE OF ILLINOIS
ATTORNEY GENERAL
BY: MR. JAY P. HOFFMAN [sic]
Appeared on behalf of the Respondent.

JODI L. HICKS
COURT SPECIALIST
Will County Courthouse
Joliet, Illinois 60432
(815) 740-8056

[2] MR. HOFFMAN [sic]: Your Honor, If we might speak to your Honor about, particularly, this case.

THE COURT: Okay.

MR. HOFFMAN [sic]: This is Herschel[l] Glenn versus Kenneth Briley. Assistant Attorney General Jay Hoffman [sic] for the respondent.

MR. SASSAN: Tony Sassan on behalf of the petitioner.

MR. HOFFMAN [sic]: This is on, your Honor, for Mr. Sassan's motion for clarification of a ruling that Judge Kallan actually issued. It's a complicated case. The People's motion to dismiss was granted in 2002. Mr. Sassan filed a motion to reconsider, which, for one reason or another, didn't get considered until August 12th by Judge Kallan. There's a question of whether the order is with or without prejudice, whether or not he needs to take an appeal, or whether he can re-plead. It was set for clarification on that matter before Mr. – Judge Burmila today. He's not here, and we're trying to figure out what to do. What Judge Burmila had done last time it was up was, instead of addressing it himself, he had the Chief Judge reassign to Judge Kallan, and she ruled on it. We're just trying to figure out if that can be done today or done Monday or if we should wait for Judge –

THE COURT: She (inaudible) ruled on it or [3] (inaudible).

MR. HOFFMAN [sic]: She ruled on the motion to reconsider because she had – she was on the habeas call.

THE COURT: Which would seem to make sense.

MR. HOFFMAN [sic]: Yeah.

THE COURT: So, what's it up for today?

MR. SASSAN: Today, I'm asking, basically, to clarify her initial order, which granted the motion – was without prejudice – I'm sorry – I'm sorry – without prejudice. The question I have that I need the answer to is whether that was a final and appealable order. If so, the deadline for me to file my notice of appeal is Monday. If not, then we stay here. But, I obviously want to make sure that I make the proper decision in terms of that.

MR. HOFFMAN [sic]: I have filed a response just today, which Judge Burmila has not been able to look at, setting forth case law, as odd as it may seem, that simply because it says without prejudice doesn't mean that it is not final and appealable given subsequent facts. So, basically, we just have to figure out when and who will hear this. The problem is that Mr. Sassan is concerned that his 30 days are up Monday. And while, as we discussed in the hallway, generally, a motion to reconsider would toll the time, we're not certain that this motion to clarify would also toll the [4] time for him to file an appeal, should things go against him.

THE COURT: Well, what do you want to protect your –

MR. SASSAN: My first and probably the easiest way would be if you were going to be sitting on the habeas call, Judge?

THE COURT: I'm not. I'm here because I got a phone call 15 minutes ago.

MR. SASSAN: Is to maybe send it over to Judge Kallan's Courtroom today –

THE COURT: Is she here?

MR. SASSAN: I peeked my head in there and it looked like she was on the bench.

THE COURT: I mean, that sounds, probably, like the most reasonable thing that could possibly happen. Since she would know absolutely more about this than anybody else here. When these files get down here, let's do that. Let's send it over there. All right.

MR. HOFFMAN [sic]: All right. Perhaps, we should go talk with her clerk and let her know –

MR. SASSAN: Thank you, Judge.

MR. HOFFMAN [sic]: Thank you, your Honor.

(Case passed and recalled as follows:)

THE COURT: All right. This is Glenn, Herschel[1] versus [5] Ken Briley?

MR. HOFFMAN [sic]: Yeah. Judge Kallan refused to hear it.

THE COURT: She what?

MR. HOFFMAN [sic]: She refused to hear it.

THE COURT: She refused to hear it?

MR. HOFFMAN [sic]: Yes. She said that her – she had clarified her order last time and wasn't going to clarify it anymore. So, I guess – so what – do you want to have it put over until Monday for Burmila to look at to see if he will –

MR. SASSAN: I – I would feel just a little more comfortable.

THE COURT: Okay. We'll set it for Monday. I mean –

MR. SASSAN: It's just with the deadline coming and the uncertainty.

THE COURT: Yes.

MR. SASSAN: And everything that's out there. At least it gives me the weekend to think about it a little further.

MR. HOFFMAN [sic]: Otherwise, like I said, you can always file another habeas. There is no limit on the number of habeases. It's not like a post-conviction.

MR. SASSAN: Right.

[6] THE COURT: Okay. Set it over until Monday then.

MR. SASSAN: Thank you, Judge.

THE COURT: Is Judge Burmila expected back?

THE CLERK: Yes.

MR. SASSAN: Put it on at 1:30. Thank you, Judge.

(Which was all the proceedings had.)

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[7] IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

I, JODI L. HICKS, certify the foregoing to be a true and accurate transcript of the electronic recorded testimony and proceedings in the above-entitled cause as authorized by Administrative Order.

/s/ Jode L. Hicks
JODI L. HICKS, Court Specialist

Dated this 28th day
of February, 2006.

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHEL[L] GLENN,	)	No. 02 MR 430
Plaintiff,	)	02 MR 431
	)	
v.	)	
	)	
KENNETH BRILEY,	)	
Defendant.	)	

(Filed Mar. 1, 2006)

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE KATHLEEN KALLAN, Judge of said court, on the 12th day of August, 2005.

APPEARANCES:

Mr. Anthony Sassan
(Attorney at Law),
on behalf of the Plaintiff;

Mr. Jay Hoffman [sic],
(Assistant Attorney General)
on behalf of the Defendant.

KATHIE E. PULTZ, CSR, RPR
CSR License No. 084-001518
Will County Courthouse
Joliet, Illinois 60432
(815) 774-7857

[2] THE COURT: Herschell Glenn versus Kenneth Briley.

MR. SASSAN: Good morning, your Honor, Tony Sassan, S-A-S-S-A-N, on behalf of petitioner, Herschell Glenn.

MR. HOFFMANN: Good morning, your Honor, Assistant Attorney General Jay Hoffmann, H-O-F-F-M-A-N-N, on behalf of respondent.

THE COURT: All right.

Why is this here today?

MR. SASSAN: Here is what happened. When you were on the habeas call, this case was before you.

THE COURT: All right.

MR. SASSAN: There were – there was a hearing set on the 2619 motion to dismiss filed by the respondent as well as a 2615.

THE COURT: All right.

MR. SASSAN: And you started those hearings October 11, 2002, and we were doing the 2619 first.

At the time the hearings took place, there were pending appeals of the first stage dismissal of post conviction petitions pending in the First and Second District.

THE COURT: Okay.

MR. SASSAN: And we do have the transcripts too. When you heard that – now, I am sorry, and the issues in [3] their 2619s were basically res judicata and collateral estoppel. And you heard the two cases were pending, so on appeal you entered an order granting the 2619 without prejudice on that basis.

I then filed a motion to reconsider. And at that time – I pulled the transcript – one of the appeals made – the situation may have been changed at the time, it is changed now. But then what you did – that was December 13, 2002. In the transcript you started asking us about some other issues that come up in these cases that were all in the 2615s.

You then took the motion to reconsider under advisement, indicated you were going to keep the file, and then allowed us to supplement the 2615 briefs because of the evulsion at the time, there were certain cases that were coming down.

The cases kept coming down and things kept getting supplemented. The case came up a short while ago before Judge Burmila. And when we got ready to argue it, we realized that there was an issue still outstanding of the actual – where this case stands because there was, in essence, a dismissal without prejudicial entered by you and a motion to reconsider that was still under advisement with you.

[4] We actually just obtained the transcripts within the last couple of weeks. And I thought that we should at least, since it is technically still under

advisement with you, determine what you are going to do with the motion to reconsider.

THE COURT: Okay.

MR. SASSAN: I don't necessarily need or expect you to do this today either, obviously.

THE COURT: Okay.

MR. HOFFMANN: Your Honor – I think the motion today – did your motion today – he filed a motion today after looking at the transcripts, it asks that Judge Kallan rule on reconsideration, didn't it? Or –

THE COURT: Well, actually, this order –

MR. HOFFMANN: Yeah. Judge Burmila said reargue before Judge Burmila. Counsel's position was, I think, according to his motion, that the motion to reconsider should be brought back before you. The State's position was that the case has now been reassigned to Judge Burmila who now handles the habeas call and, therefore, he is certainly competent to rule both on that, and should he reverse your dismissal to rule on the 615.

Now, as a result of that disagreement, Judge Burmila had me draw this order asking you to clarify if you [5] thought that the case was still before you, if you thought that you were the one who should rule on it, or if it is permissible, to send it back to Judge Burmila; whose case it now is, and have him rule on it.

THE COURT: Okay. I guess what I am having trouble with is that I took the case under advisement, from what you are telling me, four years ago and it is still there?

MR. SASSAN: Yes.

THE COURT: All right. I understand that that can happen but I never did that before. When I take a case under advisement, you get an order within a week or so. It has been my practice for 15 years.

MR. SASSAN: No, and this was not –

MR. HOFFMANN: Yeah, what happened, your Honor, it was transferred. You were –

THE COURT: Reassigned, I see.

MR. HOFFMANN: It was reassigned to Judge Burmila –

THE COURT: And I missed it.

MR. HOFFMANN: – and the result, really, petitioner has filed several pleadings after that alleging that various rulings should be used to get it on like People v. Dalapage (phonetic) and things like that. Illinois Supreme Court rules on Apprendi so what's been happening is arguments have [6] been developing and that is why it has been taking so long.

MR. SASSAN: Yeah, and this didn't slip through your cracks, Judge. There has been activity, supplementing and other things going on.

THE COURT: At the time that I was on the habeas call, my recollection is that the 3rd District was expected to take the position that Apprendi was retroactive, and we were basically waiting for an opinion. As it turned out, that expectation was false.

It would seem to me that where this case needs to be is in front of Judge Burmila, who is, in fact, assigned to that call. And I am open to suggestion on the most efficient way to accomplish that.

MR. SASSAN: Well, the – where the case stands, and my suggestion would be this. That to accomplish that quickly, you would grant my motion to reconsider and set the matter for argument on the pending 2619 and 2615s. If you do that, we can proceed quickly. If you were to deny the motion to reconsider, the dismissal is without prejudice, and then from a procedural step, what I would have to do is file a new habeas petition because the basis for the original dismissal has changed, and then I think we'd be looking at, though without all of the supplements, the briefs would pretty much be the same and we'd be arguing the [7] same point.

MR. HOFFMANN: I disagree with him in that were you to, I think you should, deny the motion to reconsider and I disagree with what he feels would eventuate were you to deny it. If he denies it, his place is to take an appeal at which time the State can raise the grounds – the specific grounds upon which you ruled and any other grounds upon which that order can be maintained. So it is not a case where

we're going to go any faster because certainly he's going to appeal this anyway.

My position basically is that, as you just said, this case is properly before Judge Burmila. You should issue an order, I don't know how to word it, indicating that although you took it under advisement, it should now be ruled upon by the Judge Burmila who now has the habeas call.

MR. SASSAN: The problem I have or disagreement I have with that approach is if your order were to stand as it does, the dismissal was initially based on a doctrine of prior jurisdiction. None of the issues germane to, you know, the Court allegations and the habeas petition and whether it is retroactive or not retroactive and what situation were addressed. So my avenue would not be tow appeal because none of those matters were ruled on by the Court.

[8] The only thing I would be able to appeal would be whether a dismissal without prejudice based on the fact that there were two other appeals pending, and not collateral estoppel, res judicata, but because they were pending was proper. That doesn't get to any of the issues raised in the habeas petition.

I also think that the – since it was without prejudice, I certainly wouldn't be foreclosed from filing a new habeas petition and getting back right to the point that we're at now.

MR. HOFFMANN: Judge –

THE COURT: I think that we're going to have to take a practical approach to this. If I were to grant a motion to reconsider, we would be reinventing the wheel and you would be right back here because Judge Burmila is not going to reconsider my decision, okay? He isn't. He isn't going to reconsider my decision.

MR. SASSAN: If you grant it, he's going to hear the (inaudible.)

THE COURT: What I am going to do is deny the motion to reconsider and let you deal with the current issues in this case based on the current law, which is much more subtle than it was a couple of years ago. I think that's the way to do it.

[9] It properly belongs in front of Judge Burmila now, and I think what this was simply a glitch because of the reassignment and I think we most practically solve that glitch by denying your motion to reconsider, and that's what I am going to do.

And then I am going to refer you back to Ed Burmila or to Judge Burmila to set it wherever it belongs.

MR. SASSAN: And so I think we're all clear, the basis for the denial is the basis that the motion was originally, your original ruling? I am not trying to get –

THE COURT: I am not going to reconsider the original ruling, so I am denying the motion to reconsider.

MR. SASSAN: Okay.

THE COURT: Okay. And whoever drafted this order, try for more clarity on the one you are going to draft now.

Do you want to go back to Judge Burmila this morning for a setting?

MR. SASSAN: I think that's what we all plan to do.

THE COURT: All right. I will send you back to Judge Burmila as soon as we get an order then.

MR. SASSAN: Okay. Thanks, Judge.

(END OF PROCEEDINGS.)

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[10] THE CIRCUIT COURT OF
THE TWELFTH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

I, KATHIE PULTZ, a Certified Shorthand Reporter for the Circuit Court of Will County, Twelfth Judicial Circuit of Illinois, do hereby certify the foregoing to be a true and accurate transcript of the electronic recording of the proceeding of the above entitled cause which recording contained a certification in accordance with rule or administrative order.

/s/ Kathie Pultz
KATHIE E. PULTZ, CSR 084-001518

Dated this 27th day
of February, 2006.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE
12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

HERSCHELL GLENN,	)	
Petitioner,	)	
-vs-	)	NO. 2002 MR 430
KENNETH BRILEY,	)	
Respondent.	)	

(Filed Oct. 18, 2005)

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable KATHLEEN G. KALLAN, on the 13th day of December, A.D., 2002.

APPEARANCES:

MR. ANTHONY J. SASSAN, Attorney At Law
Appeared on behalf of the Petitioner;

MS. MARGARET O'CONNELL, Assistant Attorney General
Appeared on behalf of the Respondent.

STEVE VITHOULKAS, CSR, RPR, RMR
Will County Courthouse
Joliet, IL 60432

[2] THE COURT: Okay. Herschell and Briley.

MS. O'CONNELL: Counsel is here on that, your Honor.

THE COURT: Okay.

MR. SASSAN: Good morning, Judge.

THE COURT: Good morning.

MR. SASSAN: For the record, Tony Sassan, S-a-s-s-a-n, on behalf of Petitioner, Herschell Glenn.

MS. O'CONNELL: Margaret O'Connell, Assistant Attorney General, on behalf of the Respondent, Kenneth Briley.

This matter comes up today for a hearing on Petitioner's motion to reconsider and vacate the October 11th order.

THE COURT: Thank you. Are we ready to proceed?

MR. SASSAN: Yes.

MS. O'CONNELL: Yes, your Honor.

THE COURT: Okay.

MS. O'CONNELL: Historically, you granted the 2619 motion. I had previously filed a 2615 motion, also, but we never got to that.

THE COURT: Okay. All right. Has the First District ruled on retroactivity?

MR. SASSAN: No.

THE COURT: Okay. And –

MS. O'CONNELL: Well, actually, the First District has [3] ruled. The different differing panels within the First District are not in agreement.

MR. SASSAN: Right.

THE COURT: All right.

MS. O'CONNELL: So it depends on where you should land.

THE COURT: Okay. So he would like to be solidly in the Third District where they have an opinion, but it's subject to revision in January anyway.

MR. SASSAN: Right. That – and there are, if you remember, there are two cases in a sense that the one act came out of, and one of the things that we are trying to accomplish is to have one court address the entire thing in one way, in one proceeding.

THE COURT: And I vote for it to be the Supreme Court.

MR. SASSAN: I know, but we have to get there first.

THE COURT: Right.

MS. O'CONNELL: Well, it's already there. It will be decided soon.

MR. SASSAN: I know the issue.

THE COURT: All right. Let me ask you this: Should the Supreme Court rule fairly quickly that the Third District is brilliant and right, will that basically resolve this case? Are there other issues?

MR. SASSAN: Judge, there are other issues.

[4] THE COURT: Okay.

MR. SASSAN: Well, there were – let me explain to the – there was a Kane County conviction where I think the retroactive application situation is resolved, and that case is a fairly easy thing because in the extending term was a brutal – exceptionally brutal and heinous.

THE COURT: Okay,

MR. SASSAN: In the Cook County case is a different scenario because in addition to the retroactive issue, what happened is that it was basically a double murder, except one body was found in Kane, one was found in Cook. Kane went first, got a conviction, then they went in Cook and got a conviction in Cook, and then used basically – then he got a life sentence in Cook based on being previously convicted of murder using the Kane County –

THE COURT: Arising out of the same transaction.

MR. SASSAN: Out of the same transaction. So that, my position is, is a new one on this issue, which I don't think has been addressed by anybody.

THE COURT: All right. Was that issue addressed in the direct appeal in the First District? I think my ruling was that – I'm not sure what my ruling was.

MR. SASSAN: I think if I say it correctly, and it might be a little short, I think basically you said the [5] cases are pending, I'm not going to touch it. The appeals are pending, I'm not going to touch it.

THE COURT: Okay.

MR. SASSAN: So I interpreted that to be as a case of prior jurisdiction type of ruling where you were not going to start ruling while the Court of Appeals –

THE COURT: Well, there was an appeal pending in the First District, yeah.

MR. SASSAN: Right. And then what I filed – okay.

MS. O'CONNELL: It's still pending though, right, in the First District?

MR. SASSAN: Yeah.

MS. O'CONNELL: Okay.

MR. SASSAN: We are – the Second District we were able to withdraw, and that's not before you

today. The First District – there has been yet another wrinkle in the First District where our initial motion to withdraw was denied, and there is a motion to reconsider their order denying – that case isn't even briefed fully yet. That's still before the First District. What I came back is – based on the prior jurisdiction ruling is to kind of restate or to make clear that, with all due respect, I don't think that doctrine should apply to these cases because we are talking about different actions under a different statute, even [6] though they are similar issues.

In my memo I found a couple cases which deal with not something out of the criminal thing but out of civil law, but the issue is the same. I am going to butcher the name. The Githoff (phonetic) case dealt with an indemnity issue which was bouncing around in about nine different courts, and the sum of that opinion is that because some of those cases were declaratory actions, some came out of counterclaims in the underlying deaths, you know, a wrongful death suit, despite all of that and despite the issue being one of indemnity, that what the Court held is because of the nature of those actions were different, that the doctrine of prior jurisdiction shouldn't – shouldn't apply to it.

There was another older case I cited which dealt with habeas, a habeas petition, where the nature of the proceedings were different. And my position in this is that even though the issue is one of Apprendi, they are brought under separate – separate acts with separate prayers of relief and separate preconditions.

And one thing that I don't think – you know, obviously we know that if I'm successful in a habeas, then he gets released. If I am successful in a post-conviction when it was filed, it's not what the prayer for relief is. But one thing that I think is a glaring difference between the two, and it was raised [7] in a motion that hasn't – that you haven't ruled on in this case, there is yet another issue as to whether Apprendi is cognizable in a habeas claim. So –

THE COURT: That one is not real solid, I would say.

MR. SASSAN: That one is all over the place as well, but I point that out to say that –

THE COURT: All right. Let's assume for the purposes of this – this isn't an argument, this is I'm thinking out loud – that you aren't that right and I have jurisdiction to go forward. Should I? Wouldn't the validity of the sentence imposed be one of the main events in the direct appeal?

MS. O'CONNELL: And it was. I did – well, not that I wasn't paying attention to Counsel –

THE COURT: The direct appeal is still pending in the First District?

MR. SASSAN: No.

MS. O'CONNELL: No.

MR. SASSAN: That's the appeal of the dismissal of the post-conviction.

THE COURT: Oh, all right. Okay.

MS. O'CONNELL: But in the direct appeal, yes, the defendant raised three separate issues regarding his natural life sentence. We contended that the section which mandated [8] the imposition of natural life solely upon a conviction of two or more murders violates the separation of powers clause. He said that there is a different statute which makes that requirement discretionary, and that his – finally, his third argument regarding his natural life sentence was that it was violative of the cruel and unusual punishment provisions of the federal constitution.

THE COURT: So he didn't actually address same transaction as an issue at all?

MS. O'CONNELL: No. And this is – and I know that Counsel was not – I don't know that Counsel was involved in the initial proceedings, but this case was originally charged as two murders in Kane County.

THE COURT: Uh-huh.

MS. O'CONNELL: The defendant was the one who came in and said I don't want to get the death penalty, and he was the one who filed a motion for change of venue because of where one of the bodies was found. I think it's true that given – well, the State tried to proceed with both of the murders in Kane County. The defendant filed a motion for change of venue based upon where one of the bodies was

found. That motion was granted, so, therefore, he went first in Kane County, got convicted, brought a murder conviction to his second trial in Cook County.

[9] THE COURT: Okay.

MR. SASSAN: Well, that's all well and good, but I think under the scope of Apprendi, that doesn't solve the issue, the problem of the same jury. And I think she's right. I don't even think I was in law school when this thing went to trial. I don't even think I was through with college when the original thing went. But from my review of the record, I believe – I believe what happened is there was a motion to change venue filed as to the count that originally ended up – ended up in Cook County, but then I believe the State's Attorney's Office in Kane County then voluntarily nolled [sic] that count, and then – so I don't know if that issue is actually litigated.

The fact that he raised it as an issue is still, I guess, in a sense that the prosecuting attorney would – certainly I don't question what they did here. They did what was easiest to prove, you know, the body ended up in Cook County, so they didn't want to take a chance on a murder case, and that makes complete sense. However, I don't think that necessarily – the fact that what they did makes sense, gets them, you know, allow an Apprendi analysis.

THE COURT: Okay. And in the interim we have the legislature tinkering with the homicide statute minute by [10] minute. At the time of the occurrence of this offense, was natural life an

available sentence for two homicides in the same transaction as opposed to having previously been convicted of a homicide? Do either of you know?

MS. O'CONNELL: It was – I can tell you that he got it – according to the Appellate Court's opinion, it says that, "defendant's natural life sentence was predicated on a Kane County conviction involving the companion murder of James Wright." So it was not the same transaction murder, it was the previous conviction for murder.

THE COURT: Okay.

MS. O'CONNELL: I don't know the answer to your specific question.

THE COURT: I don't either.

MR. SASSAN: Judge, I have that statute in a portion of this file, which has grown to quite a large stack.

THE COURT: It's one of the rules, whatever you choose to leave in the office you are going to need.

MR. SASSAN: I know. Usually I come down and I throw my back out by carrying everything, and, of course, I didn't bring that.

THE COURT: Okay.

MR. SASSAN: So I can't sit here and tell you if there was or not.

[11] THE COURT: All right. When was this murder?

MR. SASSAN: '82.

THE COURT: And I don't remember. I actually was trying murder cases in '82, which makes me older than both of you and dirt, but – and old enough to have memory problems. I think that at that time you only got to natural life by being death qualified. And if they had both been tried at the same – in the same trial, in whichever county, they would have been able to use two bodies to death qualify. That's my recollection of the statute.

MR. SASSAN: In the same county, right.

THE COURT: In the same county, in the same trial, so it wouldn't have to be a prior conviction, although they hung their hat on the prior conviction.

MR. SASSAN: My position would be I would be entitled to have a jury find on both bodies, in a sense, in the same county.

MS. O'CONNELL: For death, not natural life.

MR. SASSAN: Correct.

THE COURT: Okay. What I don't remember is whether natural life was an available sentence outside the scope of the death penalty statute, whether you had to be at stage three –

MS. O'CONNELL: Oh, wait, I may have that.

[12] THE COURT: – at that point. I would say that this is more of a pretrial conference than an actual hearing at this point.

MR. SASSAN: Are these things on all the time?

THE COURT: All the time, day and night, 24-7.

MR. SASSAN: Okay.

THE COURT: And we are constantly monitored, and I think it's Jody is making sure we are behaving ourselves.

MR. SASSAN: I had a hearing in Kankakee County that they have these wonderful microphones in the courtroom, and after the hearing I was told that they were broken.

THE COURT: Well, I did do my ET phone home this morning to tell her we were here. And they answered, so I think they are there.

MR. SASSAN: Okay.

MS. O'CONNELL: Okay. Unfortunately, it's in my 2615 motion, which we have not ever gotten to.

THE COURT: All right.

MS. O'CONNELL: But it says, "a court may sentence" – I think that was the difference. It

was, "the Court may sentence the defendant to a term of natural life imprisonment, or, if the defendant has previously been convicted of murder under any state or federal law or is found guilty of murdering more than one victim, the Court [13] shall sentence the defendant to a term of natural life."

THE COURT: Okay. So in the same transaction, if they had prosecuted both murders in the same place, he could have gotten natural life at the time.

MR. SASSAN: Uh-huh.

THE COURT: Okay.

MS. O'CONNELL: Or if he had previously been convicted of murder.

THE COURT: Okay. So either way he was eligible for natural life.

MS. O'CONNELL: He could get natural life.

THE COURT: Okay.

MR. SASSAN: And then my point being, of course, try them in the same county.

THE COURT: Of course, if they had tried him in the same county, he'd have still been eligible for natural life and it would have been a sentencing option of the judge, right? So we are out of the Apprendi question on that point.

MR. SASSAN: Well, not necessarily, because to get to that point, the jury would have had to have found him guilty of both.

MS. O'CONNELL: Well, we would have – but we were asking for the death penalty, so then we would have been in [14] a bifurcated hearing, so then we would have found him eligible for the death penalty, a jury would have found him, or a judge, by proof beyond a reasonable doubt –

THE COURT: Well, some trier of fact dealing with the beyond a reasonable doubt standard found him guilty of both murders.

MS. O'CONNELL: Correct.

MR. SASSAN: Uh-huh.

THE COURT: Okay. And it was at – basically that finding of guilty that caused him to get the natural life sentence of both murders. All right. You are both looking like, no, maybe I need to quit asking you questions and read all your pleadings.

MS. O'CONNELL: I agree, but I know Counsel doesn't.

MR. SASSAN: I mean it's – it is an issue that we did brief in that motion.

THE COURT: Okay.

MR. SASSAN: In 2615. And I don't know if it would – I can say this: I mean I'm making a point

in there that I don't think has been addressed by a court before in trying to make this distinction.

THE COURT: Okay. Do we need to address the motion that we never addressed? At this point I'm not being persuaded that we should revisit. I dismissed the whole [15] case though, so we never – we –

MR. SASSAN: It was dismissed without prejudice.

THE COURT: All right.

MS. O'CONNELL: Perhaps what the best thing to do at this juncture is for your Honor to hold in abeyance the current motion regarding the 2619 and perhaps –

THE COURT: And set the other one for hearing.

MS. O'CONNELL: The 2615 for hearing.

THE COURT: Okay. All right. If there is something I didn't consider in dismissing the case that I should have considered if we had gotten to the other motion, then by the next hearing date, which will be the 10th of January, we can do it, unless you have to start all over again and reinvent the wheel and educate another judge.

MS. O'CONNELL: Oh, please don't make me do that.

THE COURT: Reassignments are coming out next week.

MS. O'CONNELL: Okay. Can we specially set this?

THE COURT: Let's specially set this for hearing on the motion we didn't get to.

MS. O'CONNELL: Okay.

THE COURT: Do I have all the briefs?

MS. O'CONNELL: I'm sorry, Counsel, do you want to file anything in addition?

THE COURT: Okay. I am going to take your motion to [16] reconsider under advisement.

MR. SASSAN: Okay.

THE COURT: Okay. Then the motion we didn't get to, the 2615 motion, I want to set for hearing between now and January 10th. Trying to specially set it is, you know –

MR. SASSAN: I know, it's crazy.

THE COURT: It's silly. If I take it under advisement, then I will have to finish it at least as far as to do something, so let's set – let me make sure I have everybody's briefs on that motion.

MS. O'CONNELL: Okay.

THE COURT: And let's set it – can we do it on the 10th of January? Because even if I am reassigned, the ones under advisement I would keep, right? Okay. This is the motion to reconsider that's under advisement, this is the 619 motion with

exhibits. Here is the 615 motion with exhibits. Do I have your response to that?

MR. SASSAN: 2615?

THE COURT: Yes.

MR. SASSAN: You do, but if you would like, I would be happy to send you another, if you don't see it there. I don't have it with me, but I know I did send it to you, and I will be happy to send another copy.

THE COURT: Well, let me see what's in here.

[17] MS. O'CONNELL: I'm trying to think. Swift came down, but I don't see – Swift is a direct appeal case. That's the problem.

MR. SASSAN: Right.

MS. O'CONNELL: That's why it's not good.

MR. SASSAN: I mean it's a good Apprendi case.

THE COURT: Okay. I am not hitting your response to the 2615 motion.

MR. SASSAN: I can have my secretary resend a copy to you by the end of the day, Judge.

THE COURT: Okay.

MR. SASSAN: That's not a problem.

THE COURT: All right. And we are going to set that 2615 motion for hearing on the 15th. The other motion is under advisement until that time.

MS. O'CONNELL: Wait, when are we setting it for?

THE COURT: The 10th of January.

MS. O'CONNELL: Okay.

THE COURT: Which means I am going to need a suitcase for the files I am keeping trying to get sorted out before the reassignments, because I am going to keep this one, too.

THE CLERK: Okay.

THE COURT: I will hold on to this one and give you the order.

[18] THE CLERK: Okay.

MR. SASSAN: Judge, I don't think it's going to be necessary, but, once again, I didn't totally expect this, which was my fault. Could I have maybe seven days just to see – there have been a few Apprendi decisions that have come down in the meantime. I don't think they deal with this, but just to supplement whatever I said in my response.

THE COURT: I am going to give both of you until Friday, the 27th –

MR. SASSAN: Okay.

THE COURT: – to file whatever supplemental references you want to file.

MR. SASSAN: Thank you.

THE COURT: Anything you want me to consider at that hearing.

MR. SASSAN: Okay.

THE COURT: And while I have been somewhat distracted with other matters, I will get a suitcase and take this whole file home with me so I can make it all the way through it.

MR. SASSAN: Judge, in light of the – there were two – there is two files, one was Kane County, one was Cook County. And maybe I guess if you can tell me if this would be the best use of your resources. They were both dismissed [19] for the same reason. The reason why Kane County was dismissed was the pending appeal, which has been withdrawn.

THE COURT: Okay.

MR. SASSAN: Can we have you – would it be appropriate for you to address the motion filed in that case as well?

THE COURT: The motion filed in the Kane County case?

MR. SASSAN: Because I think otherwise –

THE COURT: Let's not do that.

MS. O'CONNELL: Thanks. I have full respect for Judge Kallan's previous rulings. I know I am going to lose that.

MR. SASSAN: Okay.

MS. O'CONNELL: Your problem has nothing to do with that, it has everything – and if you do, then I am going to file a motion to stay pending Christopher Lee.

MR. SASSAN: Okay.

THE COURT: No, let's not fight Kane County's part.

MR. SASSAN: I was only thinking because depending how this one goes, I would have to refile that one, and I didn't know if you would be stuck in motions again on that one.

THE COURT: Okay. All right. No, let's keep what we have more than adequate.

MR. SASSAN: Okay.

THE COURT: It will confuse us all.

MS. O'CONNELL: January 10th at 10:30?

[20] THE COURT: Yeah, or thereabouts. We do have a new county compliance office here which should eliminate some of my idiot morning call.

MS. O'CONNELL: And, your Honor, I just have one other order if I could.

THE COURT: I am going to give you the order, but I am going to keep the file.

MS. O'CONNELL: I filed Leslie Peace today. I looked at the order. I somehow wrote down January – or December 8th, which was Sunday, but I filed it today, so I ask that you grant my oral motion.

THE COURT: To extend it until today.

MR. SASSAN: Does it say anything about the time to supplement in here?

MS. O'CONNELL: No, that's fine.

THE COURT: Anything that's in my hands before the 10th I will read.

MR. SASSAN: Thank you.

THE COURT: Within reason. Okay.

MR. SASSAN: Thanks, Judge.

THE COURT: Thank you.

(AND THOSE WERE ALL
THE PROCEEDINGS HAD.)

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[21] STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

I, STEVE VITHOULKAS, Official Court Reporter for the 12th Judicial Circuit, Will County, Illinois, do hereby certify the foregoing to be a true and accurate

transcript of the electronic recording of the proceedings of the above-entitled cause, which recording contained a certification in accordance with rule or administrative order.

/s/ Steve Vithoulkas
STEVE VITHOULKAS
Official Court Reporter.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, JOLIET, ILLINOIS

HERSCHEL[L] GLENN, Petitioner, v. KENNETH R. BRILEY, Warden, Respondent.	) Case No. 82 CF 499) (Kane County))) The Honorable Joseph McCarthy (Ret.); The Honorable Phillip L. DiMarzio

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 735 ILCS 5/10-124(2)

(Filed July 18, 2002)

NOW COMES the Petitioner, HERSCHEL[L] GLENN, by and through his attorneys, BOTTI, MARINACCIO & DE LONGIS, LTD., and submits this Petition for Writ of Habeas Corpus pursuant to 735 ILCS 5/10-124(2), stating in support as follows:

1. The Petitioner, HERSCHEL[L] GLENN is imprisoned and restrained of his liberty in Stateville Correctional Center in Joliet, Illinois. Said institution is under the jurisdiction of Kenneth R. Briley, Warden.

2. A party is entitled to habeas corpus discharge if a subsequent act, omission, or event has occurred which now entitles the party to discharge. 735 ILCS 5/10-124(2).

3. On May 11, 1983, a Kane County jury found Petitioner guilty of the offense of Murder, in the case entitled *People v. Glenn,* (Kane County Case No. 82 CF 499), at a time when Petitioner was subject to a sentence of imprisonment carrying a statutory minimum term of 20 years and a statutory maximum term of 40 years in State prison. Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1(a)(1).

4. The cause of the Petitioner's imprisonment is a certain judgment of conviction for the offense of Murder; entered by the Honorable Joseph McCarthy on May 11, 1983, in the case entitled *People v. Glenn*, 82 CF 499 in the Circuit Court of Kane County, and said trial judge imposing an extended-term sentence of 70 years in State prison on June 16, 1983. Petitioner had been "in custody" on this offense since his arrest on May 9, 1982.

5. The basis for sentencing the Petitioner to the extended-term sentence of 70 years in prison, was that the Petitioner committed the offense of Murder in a manner that was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1(a)(1).

6. The Court's finding, that the Petitioner's conduct was exceptionally brutal or heinous indicative of wanton cruelty, is an essential element of the offense of Murder since that fact increased the Petitioner's prescribed statutory maximum sentence.

7. The finding that the Petitioner's conduct was exceptionally brutal or heinous indicative of wanton cruelty, is a factual determination that must be submitted to a jury and proved beyond a reasonable doubt.

8. The enhanced sentence of natural life in prison violated the Petitioner's constitutional rights to due process and trial by jury in that the Petitioner was not afforded the right to a jury determination of whether the State proved the brutal and heinous nature of the offense beyond a reasonable doubt. *Ring v. Arizona,* 2002 WL 1357257 (2002); *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Jones v. United States,* 526 U.S. 227 (1999).

9. Section 5-8-1(a)(1) of the Unified Code of Corrections (Ill.Rev.Stat., 1978., ch. 38, par. 1005-8-1(a)(1)), and paragraph 9-1(b) of the Illinois Criminal Code (Ill.Rev.State., 1978, ch. 38, par. 9-1(b)), were unconstitutional *ab initio* because they gave the Court authority to enhance the Petitioner's maximum sentence to natural life imprisonment, *pursuant to a finding by the Court* that the Petitioner's conduct was exceptionally brutal and heinous, without factual determination by a jury.

10. A defendant's sentence to natural life imprisonment, based solely on a Court's finding that the defendant's conduct is exceptionally brutal and heinous indicative of wanton cruelty, is unconstitutional. *People v. Lee,* 326 Ill.App.3d at 882, *reh'g denied,* (3rd Dist. 2002).

11. Absent the finding that Petitioner's offense of Murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the maximum sentence to which the Petitioner would have been subject was limited to 40 years imprisonment, with day-for-day good time credit, and accompanied by a three-year period of mandatory supervised release. Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1(a)(1).

12. The Petitioner, being entitled to day-for-day good time credit, has now served 20 years and 2 months in prison, two months more than the maximum sentence to which he could be sentenced without enhancement.

13. The Petitioner is entitled to habeas corpus discharge, having already served the maximum sentence to which he would have been subject, without enhancement, and two years of his mandatory supervised release term in prison.

14. No previous application has been made for this instant relief.

WHEREFORE, Petitioner, HERSCHEL[L] GLENN, prays that this Honorable Court enter an Order granting his petition for *habeas corpus* relief, as follows:

A) Issuing a Writ of Habeas Corpus directed to Kenneth R. Briley, Warden at Stateville Correctional Center, at Route 53, Joliet, Illinois 60434, commanding him to produce said body of HERSCHEL[L] GLENN, before a

Judge of this Circuit Court, at a time and place therein to be specified.

B) Finding that the extended-term portion of Petitioner's sentence is unconstitutional, and vacating that portion of Petitioner's sentence in excess of 40 years in prison.

C) Ordering that Petitioner be immediately released from custody;

D) Granting any other relief, which this Court deems to be appropriate, proper and just.

Respectfully Submitted,

BOTTI, MARINACCIO & DELONGIS, LTD.

/s/ Aldo E. Botti
One of Petitioner's Attorneys

Subscribed and sworn to
before me this 17th day of
July, 2002.

/s/ Christine Marie Lewis
NOTARY PUBLIC

Aldo E. Botti
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OFFICIAL SEAL
CHRISTINE MARIE LEWIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/05/03

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT WILL COUNTY, JOLIET, ILLINOIS

HERSCHEL[L] GLENN, Petitioner, v. KENNETH R. BRILEY, Warden, Respondent.	)	Case No. 82 CF 499 (Kane County) The Honorable McCarthy (Ret.); The Honorable Phillip L. DiMarzio

AFFIDAVIT

Your Affiant, ANTHONY J. SASSAN, having been first duly sworn upon oath, deposes and states as follows:

1. That your Affiant is an attorney duly licensed to practice law in the State of Illinois, and admitted to practice before this Court, and your Affiant has knowledge of the facts included herein.

2. That your Affiant has read the foregoing **PETITION FOR WRIT OF HABEAS CORPUS**

PURSUANT TO 735 ILCS 5/10-124(2) and states that said facts are true to the best of his knowledge.

3. Further, your Affiant sayeth naught.

/s/ Anthony J. Sassan
Anthony J. Sassan

SUBSCRIBED and SWORN
to before me this 17th day
of July, 2002

/s/ Christine Marie Lewis
Notary Public

OFFICIAL SEAL
CHRISTINE MARIE LEWIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/05/03

**IN THE CIRCUIT COURT OF
THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, JOLIET, ILLINOIS**

HERSCHEL[L] GLENN,	)	
Petitioner,	)	Case No. 83 C 3503
v.	)	(Cook County)
KENNETH R. BRILEY, Warden,	)	The Honorable Edward M. Fiala, Jr.
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 735 ILCS 5/10-124(2)

(Filed July 18, 2002)

Now Comes the Petitioner, HERSCHEL[L] GLENN, by and through his attorneys, BOTTI, MARINACCIO & DE LONGIS, LTD., and submits this Petition for Writ of Habeas Corpus pursuant to 735 ILCS 5/10-124(2), stating in support as follows:

1. The Petitioner, HERSCHEL[L] GLENN is imprisoned and restrained of his liberty in Stateville Correctional Center in Joliet, Illinois. Said institution is under the jurisdiction of Kenneth R. Briley, Warden.

2. A party is entitled to habeas corpus discharge if a subsequent act, omission, or event has occurred which now entitles the party to discharge. 735 ILCS 5/10-124(2).

3. On May 13, 1987, a Cook County jury found Petitioner guilty of the offense of Murder, in the case entitled *People v. Glenn,* (Cook County Case No. 83 C 3503), at a time when Petitioner was subject to a sentence of imprisonment carrying a statutory minimum term of 20 years and a statutory maximum term of 40 years in State prison. (Ill.Rev.Stat., 1982, Ch. 38, par. 1005-8-1(a)(1).)

4. The cause of the Petitioner's imprisonment is a certain judgment of conviction for the offense of Murder, entered by the Honorable Edward Fiala, Jr., on May 13, 1987, and said trial judge imposing an extended-term sentence of natural life in prison without parole on July 20, 1987. Petitioner has been "in custody" for this offense since his arrest on May 9, 1982.

5. The basis for sentencing the Petitioner to the extended-term sentence of natural life without parole in State prison, was that (1) in committing said murder, the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty, and (2) that Petitioner had previously been convicted of murder in the companion case tried in Kane County, Illinois entitled *People v. Glenn* (Kane County Case No. 82 CF 499) (Ill.Rev.Stat., 1982, Ch. 38, par. 9-1(b)(3).) These were the findings on which the trial court extended the Petitioner's maximum sentence from a term of 40 years imprisonment to an extended-term of natural life in prison. (Ill.Rev.Stat., 1982, ch. 38, par. 1005-8-1(a)(1).)

6. The Court's findings, that the Petitioner (1) had previously been convicted of murder; and (2) that the crime was committed in an exceptionally brutal and heinous manner indicative of wanton cruelty constituted findings of ***essential elements*** of the offense of Murder that increased the Petitioner's prescribed statutory maximum sentence.

7. The Court's findings, that the Petitioner (1) had previously been convicted of murder; and (2) that the crime was committed in an exceptionally brutal and heinous manner indicative of wanton cruelty are factual determinations that must be submitted to a jury and proved beyond a reasonable doubt.

8. The enhanced sentence of natural life in prison violated the Petitioner's constitutional rights to due process and trial by jury in that the Petitioner was not afforded the right to a jury determination of whether the State proved that the Petitioner either (1) had previously been convicted of murder; or (2) committed the crime in an exceptionally brutal and heinous manner indicative of wanton cruelty beyond a reasonable doubt. *Ring v. Arizona,* 2002 WL 1357257 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States,* 526 U.S. 227 (1999).

9. Section 5-8-1(a)(1) of the Unified Code of Corrections (Ill.Rev.Stat., 1978, ch. 38, par. 1005-8-1(a)(1)), and paragraph 9-1(b) of the Illinois Criminal Code (Ill.Rev.Stat., 1978, ch. 38, par. 9-1(b)), were unconstitutional *ab initio* because they gave the Court authority to enhance the Petitioner's maximum

sentence to natural life imprisonment, *pursuant to a finding by the Court* that either (1) in committing said murder, the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty; or (2) that Petitioner had previously been convicted of murder in the companion case tried in Kane County, Illinois entitled *People v. Glenn* (Kane County Case No. 82 CF 499) without factual determination by a jury.

10. The Petitioner's extended-term sentence of natural life imprisonment, based on the trial court's finding that the non-recividism aggravating factors that the Petitioner acted in an exceptionally brutal and heinous manner indicative of wanton cruelty is unconstitutional because it violates Petitioner's Fifth, Sixth, and Fourteenth Amendment rights to notice, jury trial, and due process. *People v. Lee,* 326 Ill.App.3d at 882, *reh'g denied,* (3rd Dist. 2002) (finding that a judicial determination of the "exceptionally brutal and heinous conduct" statutory aggravating factor as a basis to sentence defendant to an extended-term sentence violated *Apprendi*); *see also, Ring, supra*; *Apprendi,* 530 U.S. at 466.

11. Similarly, the Petitioner's extended-term sentence of natural life imprisonment based on the trial court's finding that Petitioner had previously been convicted of murder is unconstitutional because it violates Petitioner's Fifth, Sixth, and Fourteenth Amendment rights to notice, jury trial, and due process, ***as applied to the specific facts of the instant case,*** where the prior-conviction did not

satisfy the procedural safeguards contemplated by *Apprendi* in that the "previous conviction for murder" that served as one of the bases for imposing the extended-term life sentence arose from a companion case in Kane County that was related to the instant offense. *People v. Jones,* 322 Ill.App.3d 236 (3rd Dist. 2001); *see also, Apprendi,* 530 U.S. at 496.

12. Absent the finding that Petitioner's offense of Murder was accompanied by exceptionally brutal and heinous conduct indicative of wanton cruelty, and that Petitioner had been previously convicted of murder, the maximum sentence to which the Petitioner would have been subject was limited to 40 years imprisonment, with day-for-day good time credit, and accompanied by a three-year period of mandatory supervised release. (Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1(a)(1).)

13. The Petitioner, being entitled to day-for-day good time credit, has now served 20 years and 2 months in prison, two months more than the maximum sentence to which he could be sentenced without enhancement.

14. The Petitioner is entitled to habeas corpus discharge, having already served the maximum sentence to which he would have been subject, without enhancement, and two years of his mandatory supervised release term in prison.

15. No previous application has been made for this instant relief.

WHEREFORE, Petitioner HERSCHEL[L] GLENN, prays that this Honorable Court enter an Order granting his petition for *habeas corpus* relief, as follows:

A) Issuing a Writ of Habeas Corpus directed to Kenneth R. Briley, Warden at Stateville Correctional Center, at Route 53, Joliet, Illinois 60434, commanding him to produce said body of HERSCHEL[L] GLENN, before a Judge of this Circuit Court, at a time and place therein to be specified.

B) Vacating the portion of Petitioner's sentence in excess of 40 years, and granting Petitioner credit for time served towards said sentence since May 9, 1982;

C) Ordering that Petitioner be immediately released from custody;

D) Granting any other relief, which this Court deems to be appropriate, proper and just.

Respectfully Submitted,

BOTTI, MARINACCIO
& DELONGIS, LTD.

/s/ Aldo E. Botti
One of Petitioner's Attorneys

Subscribed and sworn to before me
this 18th day of July, 2002.

/s/ Christine M. Lewis
NOTARY PUBLIC

OFFICIAL SEAL
CHRISTINE MARIE LEWIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/05/03

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**IN THE CIRCUIT COURT OF
THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, JOLIET, ILLINOIS**

HERSCHEL[L] GLENN,	)	
Petitioner,	)	Case No. 83 C 3503
v.	)	(Cook County)
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1. That your Affiant is an attorney duly licensed to practice law in the State of Illinois, and admitted to practice before this Court, and your Affiant has knowledge of the facts included herein.

2. That your Affiant has read the foregoing **PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 735 ILCS 5/10-124(2)** and states that said facts are true to the best of his knowledge.

3. Further, your Affiant sayeth naught.

/s/ Anthony Sassan
Anthony J. Sassan

SUBSCRIBED and SWORN to
before me this 17th day of
July, 2002.

/s/ Christine M. Lewis
Notary Public

OFFICIAL SEAL
CHRISTINE MARIE LEWIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/05/03